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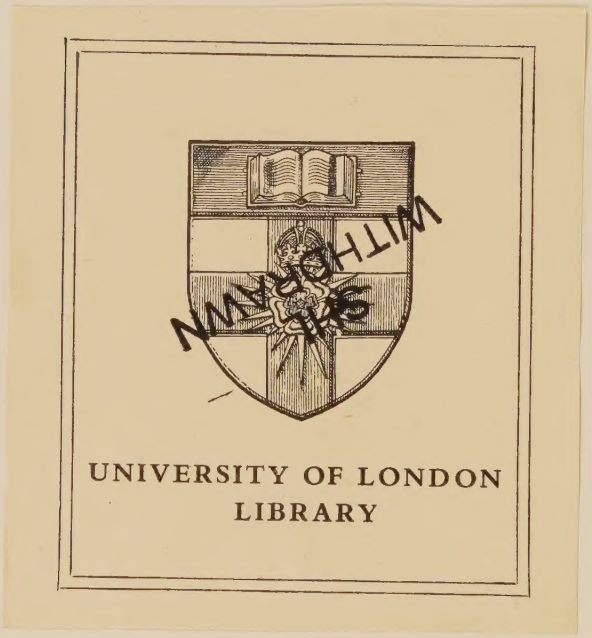

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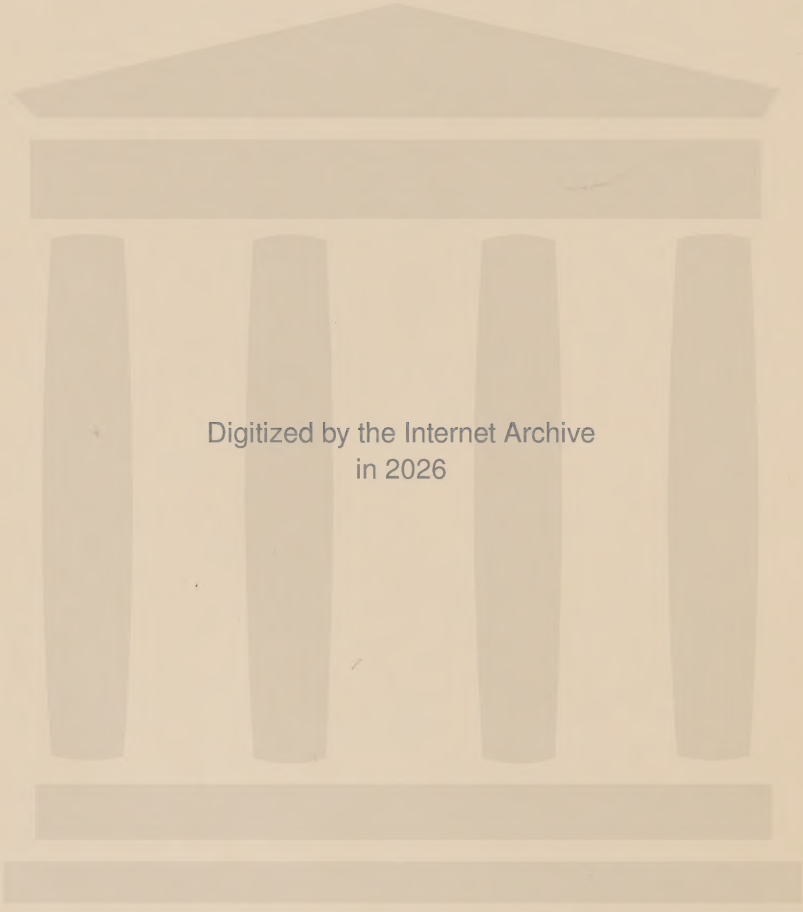
THE BRITISH YEAR BOOK OF INTERNATIONAL LAW



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HERSCH LAUTERPACHT—THE SCHOLAR AS PROPHET*

By C. WILFRED JENKS

HERSCH LAUTERPACHT was born at Lwów on 16 August 1897 and died in London as a Judge of the International Court of Justice on 8 May 1960. The story of his life is being told elsewhere with unrivalled authority.[1] The following pages are an attempt to give a reasonably full and faithful picture of his contribution as a scholar to the development of international law.[2]

The most unique of Lauterpacht's many services to the progress of international law was to maintain for a generation a broad and firm bridge between British and continental legal thinking. In this he repeated the earlier achievement of Oppenheim with whose intellectual approach he had otherwise little in common, but he did so during a period of far-reaching change which recast the whole structure of international society in a manner which Oppenheim could hardly have conceived. His role in this respect was one on which he set, and rightly set, great store. One of his early articles was a discussion of 'The So-Called Anglo-American and Continental Schools of International Law'.[3] In it he described 'the view that there exist in international law two different schools of thought, the Anglo-American and the Continental' as 'one which has gained wide acceptance in many countries, and in particular in Great Britain and the United States'. This view he challenged, claiming that it found no support 'in the existing rules of international law, or in the practice of international tribunals, or in the general jurisprudential considerations on which they profess to be based'. He marshalled his argument with reference to a wide range of specific questions, and restated it by denying that there is any fundamental difference in legal philosophy between the common law and the continental countries, but the ultimate basis of his approach to the issue was of deeper import. He regarded the doctrine of two schools of thought as questioning 'that ultimate uniformity of the sense of right and justice which is the foundation of the legal ordering of the relations between States'. It thereby became a challenge to the moral basis of all law.

'In the future, when the exclusiveness of the conception of states as the sole subjects of the law of nations will have become a matter of the past, international law will coincide with *jus gentium* as originally conceived by Greek philosophers, by Roman jurists, by

* © C. W. Jenks, 1961.

[1] By Lord McNair in a forthcoming volume of the *Proceedings of the British Academy*.

[2] I am indebted to Lady Lauterpacht and Mr. Eli Lauterpacht for giving me access to a number of Sir Hersch Lauterpacht's unpublished papers for this purpose; and to Lord McNair, Lord Shawcross, Sir Gerald Fitzmaurice and Lt.-Col. G. I. A. D. Draper for a number of valuable suggestions.

[3] This *Year Book*, 12 (1931), pp. 31–62.

scholastic writers and by the father of international law, that is to say it will become again the common law of mankind—a conception which is probably much older than that of *jus naturae*. That time is still far off. But present day international law at least constitutes a successful attempt at a common law of mankind, of relatively intensive and pervading universality and uniformity, in the limited field of relations between sovereign states. This is in itself no mean achievement. There is no good reason why it should be imperilled for the sake of traditional notions of doubtful legal value.'

It is the measure of Lauterpacht's greatness that, while never abandoning his roots in continental legal philosophy, he became an outstanding spokesman of the common law tradition in international law and the representative of that tradition from the United Kingdom on the bench of the International Court of Justice. It is typical of the British tradition of and approach to international law that they have constantly, from Gentili onwards, enriched themselves by extending a warm hospitality to intellectual currents from elsewhere. Splendid isolation has never been a characteristic of British political thought, and though the common law may at times have been parochial in its outlook towards legal developments, and particularly legal speculation, elsewhere, this has never been true of British thinking concerning international law, partly, as McNair has emphasized, because of the traditions of Doctors' Commons. There has, however, been an essential condition of, and clear limit to, this willingness to extend hospitality to intellectual influences not native to the British tradition. The British tradition has welcomed such influences as an enrichment of itself; it has not been prepared to tolerate any challenge from them to its own fundamental values which may be briefly summarized as being a firm belief in the fundamentally moral basis of all law and all political action, a belief that the ultimate test of any legal rule is its practical consequences rather than its consistency with abstract principle, and a belief in the process of growth from precedent to precedent. Lauterpacht, although born and educated in the Austrian Empire, became a part of and exercised a major influence upon the contemporary British outlook on international law because his thought represents a successful and potent synthesis of the teaching of his two acknowledged masters, Kelsen and McNair. He was able to draw in equal measure upon the fertile speculations of contemporary continental legal philosophy and upon the moral assumptions and pragmatic technique of the common law. While some common lawyers were apt to think that he at times overstepped the frontier between *lex lata* and *lex ferenda*, his knowledge of precedent was always formidable and often unparalleled, and his legitimate reply to such criticism would have been that the frontier always tends to become uncertain at times when the law is in process of vigorous development.

The range of Lauterpacht's work would seem at first sight to make it altogether impossible to describe it comprehensively within a reasonably

brief compass. Five major monographs each of which is in effect a treatise on its special subject which has marked an epoch in the development of contemporary thought on the matter, namely, *Private Law Sources and International Law*, 1927, *The Function of Law in the International Community*, 1933, *Recognition in International Law*, 1947, *International Law and Human Rights*,[1] 1950 and *The Development of International Law by the International Court*,[2] 1958; a succession of editions of Oppenheim's *International Law* which have transformed the original work so completely as almost to constitute a new comprehensive treatise on the contemporary law; an unusually voluminous body of shorter writings of exceptional range, depth and originality; a particularly memorable editorship of the *British Year Book of International Law*; the *Annual Digest of Public International Law Cases*, gradually developed into *International Law Reports*, covering a period of almost forty years; a notable series of individual opinions as a Judge of the International Court; these are indeed a titanic intellectual monument. But there is a fundamental unity in all of Lauterpacht's work which greatly lightens the burden of attempting to state its general effect. It is inspired by an all-persuasive moral earnestness, by a belief in right and justice and the contribution of government under law to the pursuit of right and justice, by the conviction that moral and legal principles apply to the conduct of States in the same manner and measure as to the conduct of individuals, and by a sense of urgency arising from the gravity of the problems confronting human society in the twentieth century.

Private Law Sources and Analogies of International Law

Private Law Sources and Analogies of International Law[3] has been for a generation one of the seminal works of contemporary international law. It was a pioneer study, and remains the authoritative evaluation, of the significance for the evolution of the international judicial process and the development of international law generally of the adoption in Article 38 (3) of the Statute of the Permanent Court of International Justice of 'general principles of law recognised by civilised States' as a source of decision in the judicial settlement of international disputes. The book falls into three parts: (*a*) an historical and theoretical examination of the concept that 'the law of nations is but private law "writ large"' and of the bearing of this concept on the dogma of sovereignty and the positivist doctrine; (*b*) an analysis of the part played by private law analogies in the development of particular principles and rules of international law; and (*c*) a digest of the

[1] Superseding an earlier book entitled *An International Bill of the Rights of Man*, published in 1945.

[2] A revised edition of *The Development of International Law by the Permanent Court of International Justice* (1934).

[3] London, 1927.

major international arbitrations down to 1925 in which occasion arose for the application of private law analogies.

Part I of the book is a powerful attack on the dogma of sovereignty and the positivist doctrine which derives much of its force from the extent to which it invokes the practice of States as the basis of the criticisms advanced. One interesting feature of the review which it contains of the attitude towards recourse to private law analogies of writers on international law from Gentili to the present day is the manner in which it throws into sharp relief the fact that English writers, from Dr. Zouche, Dr. Arthur Duck and Sir Robert Wiseman in 1650, 1653 and 1656 to Westlake in 1910, 'are almost unanimous in their opinion regarding the capacity of Roman law to serve as a source of international law in all cases where there is no conventional or customary rule at hand',[1] and that American writers have on the whole shared this view.[2]

The theoretical analysis contained in this part recognizes fully the limitations of analogy. There are four major limitations. Firstly, 'only general principles of private law recognised by the main systems of jurisprudence, ascertained by comparative study, and, if possible, declared by scientific legal opinion as fit objects of any future attempt at unification of private law, are a suitable object of analogy'. Secondly, 'not every relation between States has its counterpart in private law'. Thirdly, there is no need for recourse to private law analogies if the problem can be resolved 'by means of logical deductions from existing rules of international law or of analogy to them'. Fourthly, 'although there is a law above the States, there is not yet in existence a universally compulsory judicial tribunal to determine what the law is, or a central authority to enforce it' and certain analogies are inaccurate on this account.[3]

Part II of the book is an examination of the practice of States which is designed to show, and does in fact show, that recourse to private law analogies has played an important part in the development of many different branches of the law. Among the topics which Lauterpacht discusses in detail are the legal nature, acquisition and loss of territorial sovereignty; the bearing of the concept of effectiveness of possession as a necessary element in title on the freedom of the seas, the conception of territorial waters, and sovereignty over air-space; acquisitive and extinctive prescription; State servitudes; State succession; State responsibility; and interest and the measure of damages. In respect of each of these subjects he shows that the analogy to private law 'has been called into life by the necessities of international intercourse, and it is owing to these necessities and to the identity of the legal relations that a close analogy of rules has been established'.[4] In some respects the discussion has a prophetic quality. Thus, of

[1] p. 26. [2] p. 29. [3] pp. 85–86. [4] p. 103.

the rule *usque ad coelum* Lauterpacht writes that it 'is undoubtedly a rule of several systems of private law' but 'that only rules of universal application, or at least such as are adopted by the main systems of private jurisprudence, are suitable for the purpose of analogy in international law' and that 'the maxim *usque ad coelum* has now ceased to be a rule of this kind';[1] he therefore submits 'that reasons of convenience and the necessities of international intercourse will cause the private law principle of effective possession to assert itself ultimately, in substance if not in form, also in the domain of international aerial law';[2] in taking this view he tends to anticipate the provisions of the Chicago International Civil Aviation Convention and Agreements of 1944 and the problems which have arisen more recently in connexion with activities in space.[3] In certain other respects the lapse of time has tended to change our perspective. In his discussion of State succession, which he bases on the principles that 'the death of the individual and the changes in state sovereignty are, in relation to legal rights and obligations, crises which must be regulated by a rule of law independent of the will of the actual successor' and that 'only in the case of States being mere agencies of force unfettered by the rule of law, can this recognition of acquired rights be disregarded by the events of international life', Lauterpacht anticipates problems which have become of special importance and urgency in a period of world-wide political change; some will, however, feel that he places the backing of the law too unreservedly behind the protection of acquired rights in respect of matters where the problem is to balance the protection of acquired rights against claims for political and social change by developing concepts of due process and proper compensation.[4] With regard to State responsibility, he rejects the doctrine of absolute liability and contends strenuously for the adoption of the principle of fault; as regards the types of case which he discusses his views will now be widely accepted, but cases of absolute liability for dangerous things are considerably more important in 1961 than they were in 1927.[5]

In his discussion of private law analogy in relation to treaties, Lauterpacht starts from the principle that 'the legal nature of private law contracts and international law treaties is essentially the same'.[6] He does not completely reject the distinction between law-making and other treaties, but accepts it only 'so long as it remains clear that that distinction, useful as it may be for the purpose of convenience and classification, does not entail any consequences so far as the juridical value of both kinds of treaties as a source of international law is concerned'.[7] The distinction 'is useful if

[1] p. 115. [2] p. 116.

[3] Cf. Jenks, *The Common Law of Mankind* (1958), pp. 388–90.

[4] Cf. ibid., pp. 85 and 153–6.

[5] Cf. ibid., pp. 293–6 (economic disturbance), pp. 362–3 (atomic energy) and pp. 403–4 (activities in space). [6] p. 156. [7] p. 157.

meant to emphasise the fact that some treaties are of more permanent and general application than others, and that they resemble therefore an act of legislation',[1] but 'all international treaties are sources of law for the parties who conclude them, none is a source of law for non-signatories' and 'both, when sufficiently uniform and general, may serve as evidence of the legal conviction of States which is at the basis of customary international law'.[2] McNair's subsequent work in distinguishing the functions and legal character of different types of treaty corresponding to the variety of legal instruments known to municipal law[3] appears to call for some qualification of these views. It does not in any way affect the basic proposition that the law of treaties must draw heavily on municipal law analogies, but it suggests that in so doing a discriminating choice must be made in determining the type of legal instrument of municipal law to which a particular treaty corresponds. Lauterpacht's primary concern in pressing the contractual analogy is to challenge 'the time honoured principle that duress does not in international law vitiate a treaty'[4] and the 'doctrine that a State may lawfully rescind a valid treaty if there has taken place such a change of circumstances that, in its opinion, the fulfilment of the treaty would dangerously affect its vital interests';[5] in these respects his plea retains its full cogency and must continue to command our wholehearted assent. His submission is that 'attempts at a new scientific formulation of the law of international treaties are doomed to failure so far as they start from the admissibility of duress and from the *clausula* as warranting and necessitating a totally independent treatment of the subject'.[6] It is a mistake, he argues, to assume that these exceptions are expressive of the special character of international law.

> 'What is true is that they are illustrative of the shortcomings of international law as a system of law. They are co-extensive, so far as they go, with the absence of law within the international community; and although they must not be disregarded by positive international law, the regard paid to them is one of recognition not as institutes of law, but as anomalies tolerated by law, the legal order not being powerful enough to subject them to its sway. They are incapable either of affecting the true nature of treaties or of furnishing a basis for their legal construction.'[6]

These views reappear in the *Report on the Law of Treaties* prepared by Lauterpacht for the International Law Commission of the United Nations in 1953.[7]

This general discussion of treaties as contracts is followed by a more detailed examination of international leases and international mandates. This is perhaps the part of the book which has dated most. In 1927 the

[1] p. 157. [2] pp. 158–9.
[3] 'The Functions and Differing Legal Character of Treaties', this *Year Book*, 11 (1930), pp. 100–18. [4] p. 165. [5] p. 167.
[6] p. 156. [7] pp. 88–90, below.

precise international status of leased territories, particularly in China, and the extent to which the leases were to be regarded as disguised cessions, were of immediate topical importance, and the mandates were still so new that there were wide divergences of view concerning sovereignty over mandated territories and the respective rights of the League of Nations and the mandatory power. These have now become matters of history, but the rule which Lauterpacht uses them to illustrate remains valid. The rule may be simply stated as being that 'whenever in a treaty a generally accepted term of private law is being used, the interpretation and construction of the treaty must, unless otherwise provided, follow the principles generally recognised as implied in this particular term'.[1] The argument that 'a conception of private law taken over in a treaty means nothing or next to nothing because international law has not yet evolved a definite meaning of that conception'[2] is untenable.

> 'When in a treaty a *terminus technicus* is taken from a particular branch of science—for instance, from the field of economics and geography—is it necessary to leave it to time and to events to determine what this particular term means? Surely not. There is no reason why a *terminus technicus* belonging in the first instance to private law should be treated differently. . . . Positive international law is at liberty to modify individual rules of an institute of private law which it takes over in a treaty and to adapt them to its specific needs and requirements, but in the absence of such modification the general principles of that source of law from which the particular conception has been derived must prevail.'[3]

Private law analogies have also played an important part in the development of international rules of evidence and procedure.[4] The doctrines of estoppel (with its continental variant of preclusion), of *res judicata*, and of the power of a tribunal to determine its jurisdiction have become working rules of international procedure and in respect of such matters as appeal, revision, nullity of award, intervention, demurrers and burden of proof, international practice owes much to private law analogies.

The digest of international arbitrations which constitutes Part III of *Private Law Sources* shows clearly that recourse to private law analogies has not been an occasional expedient in cases of an exceptional character but a normal incident of the application of legal principles to the settlement of international disputes. Time and again in the course of the major arbitrations of the last century it has been apparent that 'it would have been vain to rely, for the purpose of answering' the questions posed, 'upon settled rules of international law' since 'there were no such rules',[5] whereas recourse to private law rules governing analogous relations between individuals afforded a principle or rule which constituted the basis of a reasonable and equitable award. Rules of private law are 'deemed in such cases to form

[1] p. 190. [2] p. 197. [3] pp. 197–8.
[4] pp. 203–11. [5] p. 217.

an integral part of international public law' by reason of 'the very nature of things' and as a 'result of the legal similarity of relations forming the subject-matter of an international dispute'.[1] This general thesis is substantiated by a detailed analysis of the *Alabama*, *Behring Sea*, *British Guiana Boundary*, *Alaska Boundary* and *North Atlantic Coast Fisheries* cases, the leading cases before the Permanent Court of Arbitration, notably the *Pious Fund of the Californias*, *Venezuelan Preferential Claim*, *Russian Indemnity*, *Japanese House Tax*, *Grisbadarna* and *Island of Timor* cases, two of the decisions of the Central American Court of Justice (*Honduras* v. *Guatemala and Salvador*, and *Salvador* v. *Nicaragua*), and innumerable claims cases (including a number of important decisions of the British-American Claims Tribunal under the Convention of 1910, such as the Awards in the *Lindisfarne*, *Newchwang* and *Cayuga Indians* cases). When *Private Law Sources* was published in 1927 the jurisprudence of the Permanent Court of International Justice in the matter was in the early stages of development, but the *Wimbledon*, *Mavrommatis Palestine Concessions*. *German Settlers in Poland* and *Polish Postal Service in Danzig* cases are all invoked by the author as illustrations of the same tendency. The subsequent development of the jurisprudence of the International Court and practice of more recent international tribunals has since afforded further confirmation of the validity of this general thesis,[2] though the International Court in particular appears to have been somewhat conservative in invoking general principles of law.

On the basis of this historical review, analysis of the part played by private law analogies in the development of particular principles and rules of international law, and digest of international arbitrations, Lauterpacht proceeds to formulate certain general conclusions which have a far-reaching bearing on the fundamental problems of the contemporary development of international law. These conclusions represented in 1927 a major clarification of and advance in contemporary thinking; they have now become an accepted part of a widely accepted heritage, but their validity remains unimpaired. They are best stated in Lauterpacht's own words. He submits:

'Firstly, that in the great majority of cases the measure of approach to standards or to analogy of private law is coextensive with the strengthening of the element of law, as against the absence of law, within the body of rules governing the conduct of States. Secondly, that the approximation to corresponding general principles of private law is, as a rule, tantamount to the realisation of a principle of justice and equity hitherto obscured by the part which force plays in international relations. Thirdly, that such a

[1] p. 257.

[2] Cf. Ripert, 'Les Règles du droit civil applicables aux rapports internationaux', *Recueil des Cours*, 44 (1933—II), pp. 569–664; Sorensen, *Les Sources du droit international* (1946); Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

reception of private law by the practice of States and by international tribunals has taken place to an extent much larger than the current positivist attitude made it appear and that, this being so, the uncritical rejection of private law created an artificial and unnecessary obstacle in grasping the legal relations of international life, past and present. Finally, that the work of international tribunals would be greatly facilitated by an impartial study of this problem, especially in view of their having to apply "generally recognised principles of law" supplementing international law proper.'[1]

Lauterpacht, like Fischer Williams and Brierly, recognizes and stresses that 'as there is in law a perpetual conflict between the element of stability and the element of change, between the traditional form of law and the substance of social life, so there is in every legal community, and especially in the international community, a constant conflict between the idea of right and justice and the immediate powerful interests shaping the law'.[2] Lauterpacht adds, however, a new note of urgency to the plea that right and justice must prevail.

'There were, and are, many factors which combined in order to create, to maintain and to develop in international law those elements of stability, of the generally accepted conception of law, and of the ideals of right and justice as against the crude reality of an unorganised community where every change, however lawless and discretionary, tends to become a legal rule, where every aspect of international life, however wanton and repugnant, claims to set a legal standard and where every predominant interest asserts itself as law. . . . Private law was and is one of these factors.'[2]

The recognition of its importance in the development of international law is a corollary of the basic principle that 'behind the personified institutions called States there are in every case individual human beings to whom the precepts of international law are addressed'.[3]

The Function of Law in the International Community

The Function of Law in the International Community,[4] which was published in 1933, remains, after a quarter of a century, the outstanding theoretical study of the international judicial function and its place in the settlement of international disputes. In his conception of the scope and potentialities of the judicial function Lauterpacht goes substantially beyond Westlake, Fischer Williams, Brierly and McNair. In the relentlessness of his argument there is nothing of the spirit of compromise which characterizes so much of their work, but nothing would be more unfair than to regard the book as a dogmatic oversimplification of the issue. It is a highly sophisticated book; it may be true that it dismisses every conceivable difficulty with so little of concession as to savour of the study rather than of the council chamber; but it raises every conceivable difficulty before dismissing it. Is it not fair to conclude that the case for unqualified

[1] p. 303. [2] p. 305. [3] p. 306. [4] Oxford, 1933.

compulsory jurisdiction may be much stronger than previous writers have been prepared to acknowledge and may, indeed, if argued as a matter of principle and legal theory, be unanswerable? And is it not the function of the doctrine of international law to anticipate, rather than to afford a conceptual justification for retarding, the acceptance by States of compulsory jurisdiction and all its implications?

The Function of Law in the International Community begins, like *Private Law Sources*, with a review of the positions taken by writers whose views it discards.

It shows that the doctrine of non-justiciable disputes in international law, which can be traced back to Vattel, was elaborated during the nineteenth century, and was espoused by Lorimer and Westlake, found a place in all the leading conventions relating to the pacific settlement of international disputes from The Hague Conventions of 1899 and 1907 through the Root treaties, the Covenant of the League of Nations and a possible (but not, it is submitted the correct) interpretation of the Optional Clause to the Locarno Conventions, the General Act and innumerable arbitration conventions of the 1920s. The effect of the incorporation of the doctrine in arbitration treaties was 'to perpetuate, in the form of a legal conception of apparent simplicity, the rule that the obligatory jurisdiction of international tribunals is a limitation upon state sovereignty voluntarily undertaken within the frame of a contractual obligation, and subject to denunciation and reservations'; it represented 'the enthronement in international documents of fundamental importance of what is perhaps the most typical and far-reaching manifestation of the negation of the rule of law in the society of States'.[1]

Lauterpacht distinguishes 'at least four clear—although not mutually exclusive—conceptions of legal or justiciable disputes'. The first of these conceptions is that 'legal disputes are such differences between States as are capable of judicial settlement by the application of existing and ascertainable rules of international law'; this conception poses the problem of the relation of the international judicial function to the completeness of international law and alleged *lacunae* in international law. The second conception is that 'legal disputes are those in which the subject-matter of the claim relates to questions of minor and secondary importance not affecting the vital interests of States or their external independence, or internal sovereignty, or territorial integrity, or honour, or any other of the important interests usually referred to in the so-called "restrictive clauses" in arbitration conventions'; this second conception poses the question of the relationship between the international judicial function and the determination of important issues, involves such matters as the protection of

[1] pp. 44–45.

vital interests of States and the judicial determination of the right of self-defence, and is prompted less by the inability of international law to protect important interests of States than by the apprehension that it would be dangerous to expose such interests to the risks of a decision by judges whose impartiality is regarded as problematical. The third conception is that legal disputes are those in regard to which the application of existing rules of international law is sufficient to ensure a result which is not incompatible with the demands of justice between States and with a progressive development of international relations; this third conception poses the problem of stability and change in international law and relations and invites examination of the judicial application of the doctrine *rebus sic stantibus*, of the doctrine of abuse of rights as an instrument of change, of the extension of judicial legislation by the will of the parties, and of judicial decisions as the starting-point for the modification of the law. The fourth conception is that legal disputes are those in which the controversy concerns existing legal rights as distinguished from claims aiming at a change of the existing law; this fourth conception poses the problem of the relationship between disputes as to rights and conflicts of interests and involves the question of how far the settlement of disputes in which a party asks for a change in the existing law can be rendered obligatory, with special reference to the General Act of 1928.

The doctrine that the scope for international judicial settlement as a matter of binding obligation accepted in advance is limited by the existence of gaps and deficiencies in international law played a considerable part in the discussion of justiciability by the Institute of International Law as early as 1873,[1] was re-echoed by Politis during the 1920s,[2] appears to have been accepted by the Assembly of the League of Nations in 1928, and has found direct or indirect expression in a long series of arbitration conventions. Lauterpacht finds the doctrine uncertain and ambiguous and points out that a judgment stating that there is no applicable rule of international law will be in effect tantamount to the rejection of the claim on the ground that there is no rule of law to support it.[2] In municipal law the completeness of the legal system, although taking different forms in different legal systems, is a general principle of law, and novelty of action and absence of precedents are not in themselves a bar to recognition of a claim—a rule which Sir Frederick Pollock, in his edition of Maine's *Ancient Law* 'has called "the first and greatest rule of our customary law" '.[3] The rule of law and *non liquet* are incompatible with each other. There are, of course, special difficulties in the field of international law:

[1] *Annuaire de l'Institute de Droit International*, 29 (1922), p. 36.
[2] *La Justice internationale* (1924), pp. 84, 85, 170.
[3] p. 63.

'They are the scarcity and indefiniteness of substantive rules of international law as the result of the comparative immaturity of the system, of the scarcity of precedent, both judicial and in the practice of States, and of the imperfections of the law-creating and law-amending process; the difficulties in the ascertainment of the existing law and the consequent uncertainty as to the exact legal position in many of its branches; the revealed lack of agreement between States on a number of subjects; the emphasis laid on the principle of independence and presumptive freedom of action with the resulting check upon a creative interpretation of the existing law; and, finally, the existence of substantive rules like the validity of treaties concluded under duress which, although forming part of positive international law, nevertheless constitute such a departure from general principles of law that they tend to create the feeling that there exists a gap which may well be remedied.'[1]

But these factors do not affect the essential identity of the problem of 'lacunae' in international law with the analogous problem in municipal law,[2] and the filling of the resulting gaps may be regarded as being legitimately within the scope of judicial activity.[3] There are no gaps in the formal sense that 'there is always open to the Tribunal the possibility of rejecting the claim on the ground of the absence of an agreed rule of law supporting the demand'.[4] But excessive formalism in the matter is equally an abdication of the judicial function.

'It is the idea that there do exist gaps in law—material gaps in the teleological sense as judged from the point of view of the general purpose of the law, and as distinguished from formal gaps identical with a break in the continuity of the legal order—it is this idea which has throughout the ages been a powerful and indispensable factor in the development of law, in enacting remedial legislation, in the daring application of general principles to altogether new facts of social development, in ingenious but indispensable "distinguishing" of cases, in creating fruitful fictions. How could law have developed if the assumed absence of gaps expressive of its formal completeness were to be identified with the absence of gaps pointing to material perfection? How could law develop if the fact that there is always a formal "yes" or a "no" to a claim were always to be used as a stimulus or justification for the complacent exercise of judicial logic? These dangers of exaggerated importance being attached to the formal completeness of law are particularly great in international law, where the field of detailed regulation is limited, where the postulate of presumptive freedom of action is more authoritative, and where the resulting checks upon an extensive interpretation of the existing law are more pronounced.'[5]

Approaching the matter from this angle Lauterpacht is critical of the emphasis placed by the majority of the Permanent Court of International Justice in the *Lotus Case* upon the principle that restrictions upon the independence of States cannot be presumed:[6]

'As law consists in the regulation of human conduct, it results in practice in the limitation of freedom of action. The sovereignty of the State in international law is a quality conferred by international law. It cannot, therefore, be either the basis or the

[1] p. 70. [2] p. 71. [3] p. 75. [4] p. 85.
[5] pp. 86–87. [6] *P.C.I.J.*, Series A, No. 10, p. 18.

source of the law of nations. In international law this reliance upon freedom and independence as a substantive source of law is the more dangerous as, because of reasons peculiar to international law, the number of explicit rules restricting freedom of action is limited and their ascertainment is difficult. A combination therefore of a rigid theory of the formal completeness of international law (which renders it difficult to define restrictions of freedom of action through the normal exercise of judicial activity) with an emphasis upon the sovereignty of States as a law-creating principle may easily produce results inimical to the purposes of law.'[1]

The rejection of the admissibility of *non liquet* 'implies the need for creative activity on the part of international judges',[2] but 'the undeniable freedom of judicial decision is one within the law'.[3] Caution in the matter is particularly necessary in view of the voluntary nature of the jurisdiction at present conferred upon international tribunals by States:

'The very existence of an international judiciary might be imperilled if, in the present state of international organization, the conviction gained ground among Governments that circumspection and restraint are absent in the conflict between what has been called judicial idealism and the claims of State sovereignty.'[4]

Novelty of action has in practice been a characteristic feature of the history of international judicial settlement:

'The history of international arbitration is a continuous proof of the view that the alleged absence of legal rules does not in actual practice constitute an obstacle in the way of judicial settlement of international disputes. For three lessons emerge with convincing clearness from the practice of international arbitration in the last hundred and thirty years: the first is that in the majority of cases international tribunals have been confronted with novel situations for which international law has had no ready-made solutions at hand. The second is that there is, so far as the writer is aware, no dispute on record in which an international tribunal has refused to adjudicate on the ground that there was no law applicable to the case. The third is that this consistent fulfilment of the judicial duty to pronounce the law in each case has not been achieved at the cost of sacrificing the strictly legal character of international arbitration.'[5]

International tribunals, when confronted with novel situations, may proceed in any one of a number of ways:

'(*a*) They may proceed either by analogy with specific rules of international law or by recourse to general principles of international law.

(*b*) They may apply general principles of law, notably of private law.

(*c*) They may bridge the gap by an even more conspicuous recourse to creative judicial activity, aiming at solving the controversy by shaping a legal rule through the process of judicial reconciliation of conflicting legal claims entitled to protection by law.

(*d*) They may accomplish the same task by a consideration of the larger needs of the international community and, in particular, by the necessity of rendering the contractual relations between States effective rather than ineffective.'[6]

[1] pp. 95–96. [2] p. 100. [3] p. 103.
[4] p. 104. [5] p. 105. [6] p. 111.

The general spirit in which they approach this task was well defined by the British-American Claims Tribunal under the 1910 Convention in the *Eastern Extension, Australasia and China Telegraph Co. Ltd. Case* in which the Tribunal said:

'International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.'[1]

The essential task of a tribunal is the judicial reconciliation of conflicting legal claims. As was said by Max Huber as arbitrator in the *Island of Palmas Case*, 'international law, like law in general, has the object of assuring the co-existence of different interests which are worthy of legal protection'. A judicial decision is a choice, unqualified or qualified, between such interests, and such a choice is always both possible and necessary. *Non liquet* is as alien to the spirit and practice of international judicial settlement as to those of municipal law.[2] Lauterpacht's philosophical and historical analysis of the problem of novelty of action brings him to the same practical conclusion as Fischer Williams's practitioner's approach.

Nor, *pace* Westlake, is the importance of disputes an appropriate criterion of justiciability. The history of international arbitration 'does not substantiate the view that important issues are unsuitable for judicial settlement'.[3] The British-American arbitrations are a particularly apt illustration. The *Jay Treaty*, *Alabama*, *British Guiana*, *Alaska Boundary* and *North Atlantic Fisheries* arbitrations all related to matters which were intrinsically or had been made by circumstances essentially political in character; the preliminary agreements on the basis of which the *Alabama* and *British Guiana* cases were referred to arbitration do not, Lauterpacht contends, invalidate this view. All international disputes, including legal controversies, are political in character in the sense that 'the State is a political institution, and all questions which affect it as a whole, in particular its relations with other States, are therefore political';[4] conversely, all international disputes, including political controversies, are legal in character in the sense that 'so long as the rule of law is recognized, they are capable of an answer by the application of legal rules'.[5] The test of the importance of disputes is therefore a purely subjective one. This is demonstrated by

[1] Nielsen's *Report*, pp. 75–76; see also Hurst *arguendo* at pp. 70–71.

[2] Lauterpacht discussed *non liquet* further and maintained the same view in his last article 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (1958), pp. 196–221. [3] p. 145. [4] p. 153. [5] p. 158.

the historical paradox presented by two sets of apparently contradictory facts. 'One was that disputes of high political importance were submitted to, and settled by, a purely judicial process. The other was that disputes obviously capable of decision on strictly legal lines were withheld from that procedure, on the ground that they were essentially political in their nature.'[1]

The absence of a general duty of judicial settlement, symbolized in the fact that 'the most general existing instrument of "obligatory" arbitration bears the name of an "Optional Clause" ',[2] has created an attitude which conceives of judicial settlement as an act of accommodation to another State justified only by friendly and undisturbed relations rather than as a normal method of settling disputes in a community which has renounced resort to force.

'The sense of values to which life within a civilized community has in this respect accustomed private individuals does not obtain in relations between States. . . . A State does not regard the refusal of its offer of judicial settlement as an affront to its dignity or as a denial of its membership in a legal community. A Government rejecting an offer of arbitration either generally or in regard to a particular dispute does not feel that it offends against the legal sense of other members of the international society.'[2]

One of the motives for the hesitation of Governments to submit important issues to judicial settlement is the belief or fear that international law and international tribunals will not afford sufficient protection for the vital interests of States. This Lauterpacht regards as a misconception.

'It is not sufficiently realised that fundamental rights of States are safe under international judicial settlement, for the reason that they are fundamental legal rights; that inalienable rights are safe under international judicial settlement, because nothing—except force—can alienate them; that matters which according to international law are within exclusive domestic jurisdiction are safe under the aegis of obligatory jurisdiction, because a tribunal acting judicially will necessarily adjudge them to be so.'[3]

Great as is the scope for the creative administration of the law by international tribunals, the judge has no option in such cases but to give a decision in accordance with the law as it stands and to dismiss the claim. The logic of this position is unanswerable, but a quarter of a century has elapsed and it still appears to fail to carry conviction to men of affairs. Perhaps it claims too much and it would be wiser to recognize that judicial settlement may involve substantial risks to interests which States regard as important and even vital, but that these risks must be weighed against the risks involved in the absence of any general obligation of judicial settlement in the light of the still more vital interest of securing peace on the basis of justice. This is particularly true in respect of the crucial issue of

[1] p. 163. [2] p. 167. [3] p. 174.

self-defence in respect of which Lauterpacht himself appears to adopt such a position. He distinguishes two aspects of the right of self-defence.

'There is, first, the actual use of force when there is *periculum in mora*, when a State believes its very life and vital interests to be endangered beyond possibility of redress if immediate action is not taken, when in the words of the classical definition there is a necessity for action which is "instant, overwhelming, and leaving no choice of means and no moment for deliberation".[1] It is of the essence of the legal conception of self-defence that recourse to it must, in the first instance, be a matter for the judgement of the State concerned. For if recourse to it were conditioned by a previous authorization of a law-administering agency, then it would no longer be self-defence; it would be execution of a legal decision.'[2]

But the justification for such action is not immune from subsequent judicial determination.

'Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defence is in itself capable of judicial decision, and it is only the determination of States not to have questions of this nature determined by a foreign tribunal which may make it non-justiciable.'[3]

A further source of apprehension is lack of confidence in the impartiality of international tribunals. 'The problem of the impartiality of the international judge is the Cape Horn of international judicial settlement.'[4] This remains no less true in 1961 than in 1933. One may reasonably hope that the problem of the personal integrity and probity of judges will no longer give rise to difficulty and that questions concerning the disqualifications of individual judges in particular cases by reason of earlier connexion with the case in another capacity will be solved by the application of, or on the analogy of, Articles 17 and 24 of the Statute of the International Court. Impartiality as between the parties to the dispute, as between judicial idealism and the claims of sovereignty, and as between different types of interest and schools of thought, presents a continuing problem, particularly in a world which is in some respects still more divided than that of 1933. In Lauterpacht's view the problem resolves itself into one of 'loyalty to the judicial oath of impartiality';[5] he admits that the problem is less one of conscious bias than of subconscious predisposition, but considers that 'although the subconscious factor cannot be entirely eliminated, it is to a large extent a function of the human will, of the individual sense of moral duty, and of the enlightened consideration of the paramount interest of peace and justice entrusted to the care of the judges'.[5]

In his examination of stability and change in international law Lauterpacht takes issue with Lorimer, Westlake, Fischer Williams and Brierly,

[1] This is the definition by Mr. Webster, an American Secretary of State, Moore, *Digest*, vol. 2, § 217, p. 412. [2] pp. 178–9. [3] p. 180.
[4] p. 203. [5] p. 215.

all of whom had accepted the view that 'the judicial function, conceived as a compulsory procedure, is applicable to such disputes only as, having regard to the present state of international organization and law-making, can be solved by the application of rules of law in a manner consistent with the requirements of justice and of international peace and progress'.[1] In Lauterpacht's view the problem of change is one of the central problems of legal philosophy, but 'stability and security are in themselves a powerful constituent element of justice'.[2] In much of the demand for change, widespread in 1933, 'the true objects aimed at' were 'changes in the territorial and other provisions imposed by force in the recent peace treaties'.[3] The need for change is secondary to the need for the rule of law:

> 'There are open to the international lawyer more constructive avenues of approach than the rejection of the postulate of the obligatory rule of law. First, bearing in mind that, even within the State, where the authority of the national legislature is supreme, law is to a considerable extent shaped and developed by courts, he ought to examine what are the actual extent and the possibilities of judicial law-making within the international society. Secondly, it is within his province to inquire into the scope of a deliberate extension, by the will of the parties, of the process of judicial legislation by international tribunals. Thirdly, it is his duty to consider the possibilities of political action falling short of a legislative procedure, but intended to prevent or modify the operation of legal rules deemed to be contrary both to justice and to the peace of the world.'[4]

International conciliation may play some part as an instrument of change, but in Lauterpacht's view the hopes placed in conciliation by opponents of compulsory jurisdiction overestimate its potential importance.[5]

The judicial application of the doctrine *rebus sic stantibus* has a contribution to make to the problem of stability and change. A distinction must be drawn between the doctrine as 'a pseudo-legal assertion of the absence of any binding force in international law'[6] and 'the notion that in certain cases the law will refuse to continue to give effect to originally valid contracts'.[7] The doctrine in its first aspect is closely connected with disregard of the vitiating effect of duress on the validity of treaties and will gradually lose its *raison d'être* as international society develops. In its second aspect the doctrine is akin to the rule *ad impossibilia nemo tenetur* in Roman law, the doctrine of frustration or supervening impossibility of performance in English law, the references to changed conditions in the Austrian and German civil codes and the French doctrine of *imprévision*. This residuum of the doctrine is small but not without importance, and 'whenever it occurs it is pre-eminently suitable for judicial adjudication'.[8] An illustration is afforded by the case of *Bremen* v. *Prussia* before the German *Staatsgerichthof*

[1] p. 245. [2] p. 248. [3] p. 249.
[4] p. 259, cf. pp. 34–35 and 75–76, below. [5] pp. 260–9. [6] p. 270.
[7] p. 273. [8] p. 277.

in 1925[1] which arose from a claim by Bremen to be released from restrictions on the grant of ceded territory for fishing purposes on the ground that the First World War had frustrated the aspirations of Bremen in regard to the further development of her shipping; the Court held the doctrine to be inapplicable to the circumstances of the case.

Rights may also cease to be effective by the operation of inter-temporal law, that is to say by the development of new rules of law attaching conditions of the continued validity of these rights, the *locus classicus* being the *Island of Palmas Case*[2] in which Max Huber held that a title by discovery, assuming it to be valid by the law of the sixteenth century, did not remain a good title irrespective of the subsequent development of the present rules of international law requiring effectiveness of occupation as an essential condition of acquisition of sovereignty.

The doctrine of abuse of rights is another potential instrument of change.[3] In international society, where there is no authoritative legislature, 'there may be both frequent occasion and imperative necessity for the judicial creation of new torts through the express or implied recognition of a principle postulating the prohibition of the abuse of rights'.[4] The principle, while owing its modern vogue to Politis,[5] had been recognized by Westlake and Hyde, had been mentioned by the Permanent Court of International Justice in the *German Interests in Polish Upper Silesia Case*[6] and the *Free Zones Case*,[7] and had been applied in inter-State cases by the Supreme Court of the United States,[8] the Swiss Federal Court[9] and the German *Staatsgerichthof*.[10] While the conception may be unknown *ipso nomine* in English law its equivalent exists in other forms, notably in the law of tort where much of the law of nuisance (and one might add of negligence) is essentially an expression of the principle.

'Policy, as exercised by courts in their law-making capacity or by the legislature, continuously adds new causes of wrongs, that is to say, it renders certain acts unlawful which have been hitherto exercised as a common right, and it converts into legal rights interests which have hitherto enjoyed no such protection. The process is essentially one of balancing of interests. The fact that one of these interests has hitherto enjoyed the protection of the law is certainly material, but it is not decisive. It ceases to be decisive

[1] *Annual Digest, 1925–1926*, Case No. 266.
[2] Ibid., *1927–1928*, Case No. 1.
[3] pp. 286–306. [4] p. 287.
[5] 'Le Problème des limitations de la souverainté et la théorie de l'abus des droits dans les rapports internationaux', in *Recueil des Cours*, 6 (1925—I), pp. 1–109.
[6] *P.C.I.J.*, Series A, No. 7, p. 30. [7] Ibid., No. 24.
[8] *Missouri* v. *Illinois* (1901), 180 U.S. 208; *Pennsylvania* v. *West Virginia* (1922), 212 U.S. 553; *Kansas* v. *Colorado* (1901), 185 U.S. 125 (1906), 206 U.S. 46; *Wyoming* v. *Colorado* (1922), 259 U.S. 419; *North Dakota* v. *Minnesota* (1923), 263 U.S. 365; *Wisconsin* v. *Illinois* (1929), 278 U.S. 367 (1929), 281 U.S. 179.
[9] *Aargau* v. *Zürich*, 1878, *Recueil des Arrêts*, vol. 4, pp. 46, 47; *Solothurn* v. *Aargau*, 1900, *Recueil des Arrêts*, vol. 26 (i), pp. 450, 451.
[10] *Wurtemberg and Prussia* v. *Baden*, *Annual Digest*, *1927–1928*, Case No. 86.

as soon as policy decides that it is socially more advantageous to restrict a right in favour of an interest which henceforth becomes a legal right.'[1]

The prohibition of the abuse of rights is accordingly a general principle of law with important international applications; 'it is one of the basic elements of the international law of torts'.[2] As illustrations of matters to which it may have some application Lauterpacht mentions the utilization of the flow of a river, the closure of ports, the expulsion of aliens, the denationalization by a State of its own subjects, the indiscriminate and anti-social invocation of the doctrine *cujus est solum est usque ad coelum*, and injurious use of the territory of a State in a manner prejudicial to the interests of other States. In theory, he points out, 'there is no matter falling within the domain of the exclusive jurisdiction of the State which could not be brought within the purview of the operation of the prohibition of the abuse of rights',[3] but 'the interest of the international community—in particular its interest in encouraging the willingness of States to submit their dispute to impartial and final adjudication and to abide by the decisions of international tribunals—may require that legal freedom of action should not be hastily curtailed, and that the distinction should be preserved between matters of international obligation and matters of international concern.'[4]

The scope for judicial legislation may also be extended by the express will of the parties which 'may, when submitting a dispute for judicial settlement, either by virtue of an agreement *ad hoc* or in pursuance of a previous arbitration treaty, agree that, in case the judgment should have the effect of stabilizing conditions which have become unworkable, or of creating a deadlock which leaves without protection common interests in need of regulation, it shall be within the province of the Court either to lay down rules, or to propose recommendations calculated to establish a new legal position'.[5] The first of these possibilities is illustrated by the *Behring Sea Case* and the second by the *North Atlantic Fisheries Case*. It is also 'open to international tribunals, while rejecting the claim of the plaintiff, to state, without adding a binding recommendation, that the compliance, totally or in part, as an act of grace, with the demand of the plaintiff would be in accordance with justice and equity',[6] a number of illustrations being provided by the practice of the British-American Claims Tribunal under the Convention of 1910.[7] The doubts expressed by an equally divided Permanent Court of International Justice in the *Free Zones Case*[8] concerning the

[1] p. 296. [2] p. 298. [3] p. 304.
[4] p. 305. [5] p. 308. [6] pp. 311–12.
[7] E.g. *The Home Missionary Society Case*, Neilsen's *Report*, p. 426; *William Hardman Case*, ibid., p. 497; *Cadenhead Case*, ibid., p. 508; *David J. Adams Case*, ibid., p. 536; and *Eastern Extension, Australasia and China Telegraph Co. Ltd. Case*, which affirmed the principle but declined to apply it on the facts, ibid., p. 79.
[8] *P.C.I.J.*, Series A, No. 24, p. 10.

power of the Court under the Statute to create new rights and obligations for the parties if they so request are not in Lauterpacht's view decisive, particularly in view of the power conferred on the Court by the Statute to decide *ex aequo et bono* if the parties so desire. *Modus et conventio vincunt legem.* To the question whether judicial tribunals possess the technical and expert knowledge necessary for the determination of new rights and obligations between the parties Lauterpacht replies that the expert and technical knowledge required for the creation of new rights and obligations is not necessarily greater than that required for the application and determination of existing law and that in any case the Court may, when necessary, like a municipal court in similar circumstances, be assisted by experts. In Lauterpacht's view the judicial authority and prestige of the International Court will not be prejudiced by its being entrusted with such functions,[1] but this should be done only in individual cases with full knowledge of the circumstances 'as an act of friendliness on the part of the State which may hope to benefit from the application of strict law, or which is entitled to a judicial verdict by virtue of a general arbitration treaty' and not by a general grant of authority which 'would confer upon the international court unchecked and unlimited powers of legislation'.[2] In appropriate cases, moreover, the disputants, while submitting the matter to the Court, may, as in the *Alabama Case*,[3] the *British Guiana Boundary Case*[4] and the *Orinoco Steamship Company Case*,[5] 'themselves assume part of the legislative function either by creating new rules, or by modifying or defining more clearly in the arbitration agreement the existing law'.[6]

Judicial decision may also prove the starting-point for the modification of the law by procedures other than the conferment of legislative powers upon an international tribunal.[7] Such changes may be effected by the will of the parties by treating a judicial decision as preliminary to an award *ex aequo et bono* or to further negotiation between the parties, or by securing an advisory opinion for the purpose of ascertaining beyond doubt the legal position, while leaving room for its adaptation in accordance with the requirements of political expediency. A dispute is frequently of a double nature, consisting both of a disagreement as to the existing law and a desire to have the law changed.

'In such cases the situation tends to be doubly difficult. The latent desire for change obscures the legal issue with the State interested in the alteration of the existing legal *status quo*; on the other hand, the denial on the part of the opponent of what are believed to be obvious legal rights tends to develop, in the State favoured by the existing law,

[1] p. 325. [2] p. 328.
[3] Moore, *History and Digest of International Arbitrations* (1898), vol. 1, pp. 495–682.
[4] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 227–33.
[5] Scott, *The Hague Court Reports* (1916), pp. 226–74.
[6] p. 328. [7] pp. 330–49.

a disinclination to show such attitude of reasonableness and accommodation as it might otherwise be inclined to show. But if it is true to say that petty insistence on acquired rights produces irritation and friction, then it is equally true to say that a denial of what is believed to be a valid legal right creates the feeling that a moral wrong has been inflicted upon the State. It is not so much the denial of the object of the dispute as the denial of an impartial decision on an asserted legal right which creates the sentiment of an injury received. In cases like this the legal decision creates a convenient and welcome starting-point for an attitude of accommodation. It clears the air. Before the law can be changed it is essential to know what the existing law is; if a future relation is to be established on the basis of equity, then the existing legal position, which only in exceptional cases is entirely devoid of an element of equity and justice, must furnish one of the bases of the future settlement. It is the bridge between statics and the dynamics of the law. It removes the element of dispute; it throws open the field of understanding. It is incompatible with the dignity of the law that it should be disobeyed, but it is not incompatible with its dignity that it should be changed, once it has been ascertained, by the agreement of the parties. Such a change may be the result of a voluntary agreement between the parties. But it may also be thought of as part of an international machinery calculated to remedy the drawbacks of the absence of an international legislature and to facilitate the transition from a static to a dynamic international law.'[1]

Provision for such modification of the law should not, however, be left solely to the will of the parties; institutional provision for such modification by the political organs of the international community is also desirable; the Court may have a significant function in initiating such action:

'Thus, it might be considered how far, possibly by an appropriate change in the Statute, the Court should be empowered to state that the judgment, whilst given in accordance with the existing legal position, might with advantage be considered, with a view to a possible modification of its terms in the wider interest of international peace, either by the parties themselves or by the Council of the League. Such an opinion on the part of the Court, if expressed either with unanimity or with a substantial majority approaching unanimity, could, as a further step, be given the effect of suspending the execution of the judgment pending the consideration of the matter by the Council. Although not accompanied by an express recommendation as to the solution of the difficulty, it would undoubtedly carry weight in any subsequent deliberations of the Council.'[2]

The problem of change and the rule of law involves a choice between different degrees of danger:

'It is not permissible to reject an institution indispensable to the life of a community under the reign of law merely because its application may, in view of the deficient organization of the international society, be fraught with danger. The obvious duty of the lawyer is, first, to weigh the consequences of the repudiation of obligatory submission to international tribunals against the contingencies of a remoter nature arising out of the absence of an international legislature. . . . The argument that, in view of the absence of an effective machinery of change, obligatory arbitration may result in perpetuating some crying injustices of customary and conventional international law is undoubtedly persuasive and cannot be ignored. But the rejection on this account of

[1] pp. 330–1. [2] p. 337.

obligatory arbitration amounts in the last resort to a sanction of the reign of force, and the question arises whether force is more likely to prove an instrument of just change. Thus viewed, the problem reduces itself to one of choice between peace and war, or law and force, as instruments for securing justice. There is no escape from the necessity of making that choice, for there is an obvious incompatibility between the current acceptance of the idea of arbitration and the accompanying limitation of that acceptance of the rule of law by the qualification that the reign of law can be accepted only in so far as the law operates justly. Such a qualification amounts to saying that a State acknowledges the supremacy of law so long as it operates in its favour, but that it rejects it when it ceases to be of advantage and imposes burdens. Even if the view be accepted—and it may be readily accepted—that the social ideal is not law, but justice, there still remains the fact that ultimately law is the more effective guarantee of securing that end. . . . The conflict between stability and change and between security and justice can never be finally obliterated. It is inherent in the life of a developing society. It can be removed only at the cost of eliminating either security or social change.'[1]

The fourth conception of the limitation of the judicial function is that a distinction must be drawn between disputes as to rights and conflicts of interests. On this definition non-justiciable disputes are those in which the claimant party does not profess to base its claim, or the defendant party its defence, on a rule of law, but in which one party or both ask for a change in the existing law. This was Fischer Williams's view and was shared by Brierly. Lauterpacht rejects it with some vigour:

'It is not within the domain of legal science to discover remedies calculated to remove friction among nations, but it may not be altogether beyond the province of the lawyer to attempt to assess the place of so-called conflicts of interests in the scheme of pacific settlement of international disputes. It is submitted that, while it is dangerous to underestimate the true causes of international conflicts, it is undesirable to exaggerate them. A conscientious survey of the causes of the chronic uncertainty in international relations, and of the possible causes of international friction, would show how little substance there is in the insistence that changed conditions of internal and external power, unaccompanied by corresponding legislative changes in the international sphere, unavoidably result in conflicts of interests dangerous to the peace of the world.'[2]

The conception that territorial changes are the only outlet for and the only expression of national development is antiquated and historically false, and in an international society living under the reign of law the clash of economic interests need not in itself constitute a danger to the cause of peace:

'It is not the nature of an individual dispute which makes it unfit for judicial settlement, but the unwillingness of a State to have it settled by the application of law.'[3]

There can be no obligatory settlement of so-called conflicts of interests, but this is not a valid reason for limiting the obligation of judicial settlement:

'It is submitted that there is a fundamental fallacy in any attempt to provide, by

[1] pp. 344–7. [2] p. 366. [3] p. 369.

means of a classification of controversial value, for a system of binding pacific settlement in cases in which a State formally and openly places itself outside the existing law. Should such situations be ignored? They must logically and legally be ignored in any treaty of binding pacific settlement. It is impossible, in a scheme of things devised to secure the reign of law, to provide machinery calculated to enable a State to disregard the law in a manner binding upon the party which is willing to abide by the law. It is inadmissible and impracticable to enable a State to choose, in a manner binding upon its opponent, between judicial settlement (if it is of the opinion that the law is on its side) and (if it thinks that the law is against it) between another agency of pacific settlement which may compulsorily deprive its opponent of its legal rights. Disputes in which one party openly professes to place itself outside the existing law, although they may be amenable to the procedure of negotiation, conciliation, and consultation, must remain outside the sphere of obligatory arbitration.'[1]

The General Act for the Pacific Settlement of International Disputes—and similar conventions—accordingly reject and rightly reject the principle of obligatory settlement of conflicts of interests; in these circumstances the distinction drawn by the General Act between disputes as to respective rights and other disputes serves no useful function.

The doctrine of the limitation of the judicial function in international society is also supported by the suggestion that the limitation of the place of law is a recognized factor within the State. After considering the alleged limitation of the rule of law in matters within the sphere of administrative discretion and adjudication, the conception of act of State, the limitation of the scope of positive legal regulation, limitations of the sphere of law resulting from the actual stage of cultural and political development of a given society in a given place and time, and the admissibility, even in advanced law in modern society, of such varied forms of self-help as the right of self-defence, retaking of goods wrongfully taken away, expelling a trespasser, extrajudicial liens, distress for rent, abatement of a nuisance, right of appropriating or retaining debts, distress damage feasant, and so on, Lauterpacht concludes that no valid argument can be derived from the realm of municipal law in support of the existing rule of international law denying the obligatory jurisdiction of courts in settling disputes between States:

'Within the State the sphere of law embraces ultimately every scope of human activity, either by regulating it directly or by affording it legal protection from forcible interference. The courts or other law-administering agencies are competent to deal with every possible claim, either by recognizing the legal right to enforce it, or by forbidding acts of force calculated to give effect to it. . . . In municipal law the supposed non-justiciability of certain matters refers to what may be called the superstructure of functions added to the fundamental function of the law, namely, the function of securing peace. In international law it refers to its very basis.'[2]

[1] pp. 372–3. [2] pp. 395–6.

A contradictory ground on which the doctrine of the limitation of the international judicial function is supported is the so-called specific character of international law as a law of co-ordinated entities deriving its authority from the self-limitation of the State (Jellinek), from the binding of the common will of States by *Vereinbarung* (Triepel) or from the rule *pacta sunt servanda* (Cavaglieri and Anzilotti). In Lauterpacht's view the positions of Triepel, Cavaglieri and Anzilotti are not incompatible with the principle of compulsory jurisdiction:

'From the rule that obligations of international law owe their origin to the will of States, it follows that new obligations cannot be imposed upon an unwilling State by any international legislature. But from the principle that a State is objectively bound by an obligation once undertaken there follows, with inescapable logic, the juridical postulate of the obligatory rule of law through the instrumentality of courts. For international tribunals do not impose new obligations. They ascertain existing law. They give effect and expression to the will of the State by ascertaining what obligations it has undertaken by way of express or implied consent.'[1]

For all these reasons Lauterpacht questions whether the international community can continue to live with the principle that the jurisdiction of the International Court rests on a voluntary basis:

'In municipal law the interests of the State are *summum jus*. The State is bound by its own will so long as that will exists, but, subject to certain constitutional requirements of form, it may change its will, and with it the general contents of its law. It has at its disposal general provisions of the utmost flexibility which enable the organs of the State, while remaining within the orbit of the law, to overrule and change existing rules of law in response to the political considerations of the *salus rei publicae*. The rule of international law sanctioning the State's freedom from the bonds of obligatory judicial settlement means that the State assumes, as against other equal members of the international community, the same position as it enjoys in relation to the individuals subject to itself. This is, indeed, a sufficient reason why the application of this doctrine to the relations between States must be rejected. Any doctrine which, in relations between States, postulates the individual interest of the single State as the ultimate standard of values and of legal obligation, amounts to a negation of international law. It disregards the fact that, while in its internal relations the State is a law unto itself, and while its important interests are there the decisive consideration, this is not so in its capacity as subject to international law. This does not mean that international law disregards its important interests. It means only that these highest interests are recognized, measured, and adjusted by international law by reference to the equal interests of other States and to those of the international community as a whole. Undoubtedly the ultimate purpose of law is to serve the interests of those subjected to its sway. But that cannot mean that every important interest, so deemed by the State in question, can claim superiority over rights, recognized by international law, of other States. No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State. International law is made for States in their totality, and not for the transient benefit of the individual State. So far as the State's

[1] p. 420.

vital interests are concerned they are invariably within the sphere of legal protection by international law. But they are so protected as part of the international legal order. The sanctity and supremacy which metaphysical theories attach to the State must be rejected in any scientific conception of international law.'[1]

The difficulty cannot be avoided by taking refuge in the primitive character of international law:

'The difficulty is not solved by the assertion that primitive communities offer an historical proof for the view that rudimentary systems of law do exist notwithstanding these shortcomings. For not only does the designation of the rules, obtaining within a community, as "rules of law" beg the question of their legal nature; and not only is a cumulation of these shortcomings unknown even to primitive society: the decisive factor is that modern States are *not* primitive communities and that there is a patent contradiction in any attempt to construe the relations between States of to-day as governed by the law of primitive peoples.'[2]

In these circumstances a heavy responsibility falls upon the science of international law:

'In this vindication of the dignity of their science international lawyers are confronted with two tasks, whose performance ought not, it is believed, to be delayed much longer. Both these tasks arise directly out of the subject discussed in this book. The first is the imperative necessity for abandoning a doctrine which—expressed in the traditional distinction between justiciable and non-justiciable or legal and political disputes—has lost its original usefulness and has become an obstacle in the way of legal progress. The variety of contradictory meanings attached to this distinction, together with the disconcerting fact that a scientific discussion has been conducted for many years on a matter of fundamental importance bearing upon international life amidst a confusion of language which has rendered, and must render, that discussion fruitless, are not likely to enhance the authority of international law. Even if it could (although in fact it cannot) be shown that each of the four aspects of the conception of justiciable disputes is sound in itself, the very fact that they cover substantially different categories of disputes (so that a dispute which is justiciable according to one test is non-justiciable according to another) makes it unfit for the purpose of scientific exposition or for the expression of legal obligations in an international treaty. The doctrine can mean so much that it does not mean anything. International lawyers have in recent years become increasingly conscious of this difficulty. However, their attitude on this question creates the impression of a passive acquiescence in an inherited evil. Baffled by the impasse into which the current distinction between the two classes of disputes has led them, some international lawyers believe that, although the distinction between legal and political disputes may be theoretically correct, its practical importance is insignificant. Others express the view that, although theoretically difficult to establish and to maintain, it may render useful service in practice. It has been shown here that the doctrine is untenable in theory and harmful in practice. . . . The second task with which international lawyers are confronted lies in the domain of method and general approach. The opposition, on the part of many international lawyers of authority, to the universal application of judicial settlement, and their insistence on the necessity for retaining in some form the traditional classification of disputes, come from the conviction that law must not be treated as a panacea

[1] pp. 429–31. [2] pp. 433–4.

able to secure peace in all circumstances. There is, as we have seen, certainly much force in this view. But it is essential that international lawyers should develop an attitude of criticism in regard to the very effective—although now somewhat trite—argument that law is not a panacea. Law can never, on the plane of mere fact, become an effective substitute for war. But that does not mean that law is not in itself a powerful constituent element of peace. Undoubtedly the effectiveness of the law depends to a large extent upon the prevalent practice and the general level of morality, but the very fact of the reign of law is, and tends to become increasingly, part of common practice and morality. The reign of law, represented by the incorporation of obligatory arbitration as a rule of positive international law, is not the only means for securing and preserving peace among nations. Nevertheless it is an essential condition of peace. A given factor may not be the only condition of the consummation of a desired object. But that does not mean that it is not an indispensable condition of its achievement, or that there are not in existence other conditions equally essential. From the fact that obligatory arbitration is a *conditio sine qua non* of the normal machinery for the preservation of peace, it does not follow that peace is not equally dependent on other factors, including an enhanced consciousness of international solidarity, and a broad-minded preparedness not to rely rigidly on acquired legal rights when such rights happen to conflict with justice and with the peaceful and progressive development of international relations.'[1]

A quarter of a century has elapsed since *The Function of Law in the International Community* was published and it remains without peer as a theoretical and historical analysis of the problem of the compulsory judicial settlement of international disputes. But the problem remains at least as intractable as a practical problem as it was a quarter of a century ago. Is the analysis defective or is popular prejudice incorrigible and practical statesmanship impotent? There appears to be one major flaw in the argument. Lauterpacht is justly critical of the mutual incompatibility of the different concepts of the limitations of justiciability, but it is equally true that in his criticism of these different concepts he concedes so little to each of them that his refutations of each of them taken individually are to some extent incompatible with each other. It cannot be simultaneously true that the law is sufficiently fluid to allow for constant growth and adaptation to new conditions, and sufficiently predictable to give complete protection to what States with vested rights regard as interests entitled to unqualified protection. Politically and practically this is the heart of the matter; it is largely for this reason that the problem of compulsory jurisdiction still remains primarily a problem of confidence; and the only solution for it is to be found, as Lauterpacht himself recognizes, by regarding compulsory jurisdiction as an element, but only one element, in the development of an organized international community in which the risks of compulsory jurisdiction—which are real—are accepted as part of the price of the stable international order without which there can be neither peace nor justice.

[1] pp. 434–8.

Perhaps I may be allowed to sum the matter up in language which I used in 1929 in a review of Lauterpacht's article on 'The Doctrine of Non-Justiciable Disputes in International Law',[1] the precursor of *The Function of Law in the International Community*:

'It may be that all disputes are capable of some settlement before a law court. It does not follow that peace will be adequately secured if we make arrangements for the judicial settlement of all disputes. It is not sufficient within the State to establish a judicial system with jurisdiction over all classes of offences. Such a system may exist contemporaneously with a social system which invites revolution. There is an exact parallel in the international sphere.'[2]

The Development of International Law by the International Court

The Development of International Law by the International Court[3] is neither a treatise on the organization and procedure of the International Court of Justice nor a systematic digest of its decisions on substantive points of law; it is something far more valuable than either as a contribution to the future development of international law and organization, namely, an appraisal of the international judicial process as a factor in the further development of the law. It might appropriately have been called 'The Nature of the International Judicial Process' and, though it differs from Cardozo's lectures in having developed from a stimulating essay into a treatise supported by a wealth of detailed illustration, one may reasonably hope that it may have an influence comparable to that which has been exercised by Cardozo on accepted thinking concerning the process of judicial decision in municipal law.

The volume as published in 1958 grew out of a course of lectures on 'The Development of International Law by the Permanent Court of International Justice' delivered at the Graduate Institute of International Studies in Geneva in 1934 and published later in the same year. No one who heard the original lectures can forget their freshness and the memorable reception which they received from the sophisticated audience which frequented Geneva in those days.

Lauterpacht presents his conclusions in five parts corresponding to the chapters of the 1934 volume which he describes as 'The Law Behind the Cases', 'Judicial Caution', 'Judicial Legislation', 'The Effectiveness of the Law' and 'The Court and State Sovereignty'. Some may feel that this arrangement, which was entirely appropriate in a course of lectures presented as an essay, tends to become somewhat artificial at places in the present comprehensive treatise, particularly in the antithesis between

[1] *Economica*, No. 24 (December 1928), pp. 277–317.

[2] 'The Province of Law in International Relations' in *Pax* (Liverpool), No. 3 (June, 1929), at p. 20.

[3] London, 1958.

judicial caution and judicial legislation, but Lauterpacht could have replied that it had the advantage of preserving continuity with the original edition, that any alternative arrangement might well be equally artificial, and that the arrangement is in any case of secondary importance for the development of his theme and its variations. The antithesis between judicial caution and judicial legislation, moreover, while somewhat artificial as an arrangement of the discussion of particular cases, throws into sharp relief a fundamental dilemma of judicial method.

Under the title 'The Law Behind the Cases', Lauterpacht discusses the role of the Court as an agency of pacific settlement and an agency for the development of international law. He rightly insists that neither the fact that the majority of the cases which have come before the Court have arisen out of a disputed interpretation of a treaty, nor the fact that most of the contentious cases have arisen out of rights of private individuals, nor the relative preoccupation of the Court with pleas to its jurisdiction questions and disputed questions of fact, justifies the impression that the significance of the work of the Court for the development of the law is of limited compass. The occasions for many of the pronouncements of the Court may have been of secondary importance, but this has not impaired the value of the pronouncements themselves as a weighty contribution to the development of the law. Among the passages in this discussion of international judicial technique which are of special interest are that concerning the practice of the Court in respect of the citation of international judicial and arbitral precedent,[1] that elaborating the thesis that exhaustiveness in judicial reasoning is essential to promote full confidence in the decisions of an international court or tribunal,[2] and that reviewing the justification for and proper limits of dissenting opinions.[3]

Some of the illustrations of judicial legislation mentioned give a revealing picture of the part already played by the Court in the constructive development of the law. They include the adoption, in the *Iraq Boundary Case*, of the principle *nemo judex in re sua*; the recognition, in the *Certain German Interests in Polish Upper Silesia Case* and the *Free Zones Case* of the doctrine of abuse of rights; the assertion in the *Chorzów Factory Case* that any breach of an international engagement involves an obligation to make reparation; and the recognition in the *Jurisdiction of the Courts of Danzig Case* that individuals may be subjects of international law, followed by the similar recognition in the *Reparation for Injuries Case* of the legal personality of the United Nations *erga omnes*.

There are three sections of the volume, the chapter dealing with preparatory work in the interpretation of treaties and the parts devoted to the principle of effectiveness in the interpretation of treaties and to the Court

[1] pp. 8–20. [2] pp. 37–49. [3] pp. 66–70.

and State sovereignty, which, in addition to throwing important light on the general theme of the volume, are in effect monographs on questions of major importance.

In his discussion of the question of preparatory work in the interpretation of treaties, Lauterpacht reduces both the essentials of the matter and its judicial history to refreshingly simple and convincing terms. It is, he concludes, 'contrary both to principle and practice to exclude preparatory work altogether', but 'the fact remains that the actual text of the treaty and not the contents of the negotiations preceding it express the will of the parties'; 'the nature of the treaty-making process necessitates, in the matter of preparatory work, a solution which lies half-way between the finality of the text and the indiscriminate use of preparatory work'. This represents the position which the Court now appears to have reached.

> 'The Permanent Court of International Justice showed little inclination to act rigidly on the assumption that the Treaty in any particular case is so clear as to render recourse to or study of *travaux préparatoires* inadmissible or otiose. The International Court of Justice in the first phase of its activity—as evidenced in the Advisory Opinion of 1948 on *Conditions of Admission to Membership in the United Nations* and in the Advisory Opinion of 1950 on the *Competence of the General Assembly for the Admission of a State to the United Nations*—was content to assume that the plain and natural meaning of the relevant clauses precluded recourse to *travaux préparatoires*. It may be noted that in the latter case there were unusually strong grounds for a conclusion of that nature. In the former case, a weighty Dissenting Opinion effectively cast doubt on the ruling of the Court that the text of the Treaty was so clear that there was no occasion to have recourse to preparatory work. Cases decided subsequently suggest a modification of that attitude in as much as the Court, in actually examining the preparatory work leading to the conclusion of the texts before it, has tended to adhere to the true substance of the practice of the Permanent Court of International Justice and to what is believed to be a sound principle of interpretation of treaties.'

In connexion with the principle of effectiveness, Lauterpacht discusses in turn its application to cases relating to territorial settlements and the acquisition of territory; its bearing on provisions conferring jurisdiction; the effectiveness, in fact as well as in law, of clauses providing for equality of treatment; and the effectiveness of international institutions and international organization. In this last context, he reviews the contribution made by the Court at successive stages of its work to the constitutional development of the International Labour Organization, the League of Nations and the United Nations, and discusses the implied powers of the United Nations. While regarding the principle as 'an instrument of considerable potency' which may 'be as comprehensive as all the rules of interpretation taken together' and frequently 'renders unnecessary any recourse to subsidiary sources of law' he is careful to draw attention to the limits of its application.

'At the same time it must be borne in mind that the principle of effectiveness is only one of the standards of interpretation; that its function as an instrument designed to assist, in accordance with good faith, in giving effect to the intention of the parties must not be permitted to displace such intention; and that it ought not properly be allowed to degenerate into a rule of thumb as distinguished from a flexible, critical and discriminating guide to interpretation. . . . As stated, in essence it is no more than a requirement of good faith. But good faith requires no more than that effect be given, in a fair and reasonable manner, to the intention of the parties. This means that on occasions, if such was the intention of the parties, good faith may require that the effectiveness of the instrument should fall short of its apparent and desirable scope.'

The discussion of the manner in which the Court has approached the conflicting claims of sovereignty and law was one of the most stimulating passages in the original 1934 volume and was developed in the 1958 volume into a masterly survey of the whole subject. The ground covered is best summarized in Lauterpacht's own words:

'. . . in a considerable number of cases the Court, in interpreting international law, has been in fact confronted with a choice between the principle of the minimum of restrictions upon the sovereignty of States and the attribution of full effect to what appears to be the purpose of the obligations binding upon or undertaken by them. We have seen that the result of that choice has been such that the jurisprudence of the Court in this sphere can to a large extent be conceived in terms of a restrictive interpretation of claims of State sovereignty. It is sufficient to recall the rejection of the rule of absolute unanimity in the interpretation of the Covenant of the League of Nations; the cases of affirmation of the competence of the Court through a bold interpretation of jurisdictional clauses, the assumption of an implied submission by the parties and the disregard of requirements of form; the interpretation of Minorities Treaties in favour not of States but of the system of protection of minorities, and, generally, the construction of clauses providing for equality of treatment in a manner calculated to secure their observance not only in law, but also in fact; the wide interpretation of the scope of the competence of the International Labour Organisation and of other international organs such as the International River Commissions; the recognition of the prohibition of abuse of rights; the pronouncements confining within its proper scope the exception of domestic jurisdiction both under Article 15 of the Covenant of the League of Nations and elsewhere; and the emphasis upon the superiority of international obligations over municipal law.'

The Court has exhibited the same attitude to some of the traditional claims and emanations of sovereignty more directly in a variety of ways, for instance

'by discouraging undue reliance on restrictive interpretation of treaties; by stressing the obligations of sovereign States in the matter of State succession; by admitting the possibility of treaty rights extending to non-parties; by recognising the propriety of extending the obligations of general treaties to States which are not parties thereto; by rejecting the plea that the application of national legislation to aliens and nationals alike constitutes a sufficient justification for the avoidance of international obligations; by framing the law relating to damages in accordance with general principles and not

with the claims of the sovereign State to a more restrictive assessment of the duty of compensation; by denying or confining within narrow limits the traditional claims of the State to full freedom of action in cases of self-preservation, necessity and intervention as well as with regard to reservations to treaties; by treating sovereignty not as an absolute but as functionally and otherwise divisible and separable; and, finally, by subjecting to the rule of law such collective sovereignty of States as is embodied in the General Assembly of the United Nations.'

The principal reasons which have shaped this attitude

'stem, in the main, from the overriding fact that while the law, in its ultimate result and purpose, protects the freedom—in the international sphere, the sovereignty and independence—of those subject to its sway, it does so at the same time by subjecting them to its restraints and obligations.'

Nevertheless, 'the fact that sovereignty is in many respects part of international law' implies that the Court has an obligation, which it respects, to give effect to rights of sovereignty recognized by the law. In respect of certain quite vital matters, notably the bearing of the freedom of action of sovereign States on 'the creation and judicial recognition of binding customary international law', the existing jurisprudence of the Court, as represented by the *Lotus*, *Fisheries* and *Genocide* cases, may well be regarded (though Sir Hersch, in his extended discussion of these cases, was careful not to say so) as raising more questions than it solves.

Conscious of the obligation of judicial restraint and reticence, Lauterpacht was consistently guarded in his conclusions and scrupulous in stating fully and fairly every side of every controversial issue. Others are at liberty to speculate more freely. The volume prompts a number of queries concerning the jurisprudence of the Court which would appear to be of crucial importance not merely for the future of international adjudication but for the future of international law itself.

One salient impression is that, while the first four decades of authoritative international jurisprudence have given us an imposing body of precedent on a significant range of issues and the elements of a far-sighted international judicial technique, the future is still far from being assured. There remains a wide freedom of choice both as regards questions of substantive law and procedure and in respect of the fundamentals of judicial method. Lauterpacht repeatedly draws our attention to cases which may be regarded as qualifying each other. As illustrations we may mention the *Eastern Carelia Case* and the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case* as regards the validity of a request for an advisory opinion made without the request of a party concerned; the *Panevezys–Saldutiskis Railway Case* and the *Reparation for Injuries Case* as regards the nationality of claims; the *Interpretation of the Treaty of Lausanne* (*Iraq Boundary*) *Case* and the *Reservations to the Genocide Convention Case* as regards the principle of unanimity; the *Corfu Channel Case*

and the *Anglo-Iranian Oil Co. Case* as regards *forum prorogatum*; the *Phosphates in Morocco Case* and the *Electricity Company of Sofia Case* as regards the reservation of 'past disputes' from the compulsory jurisdiction of the Court; and a whole series of cases as regards recourse to preparatory work for the interpretation of treaties. It is, of course, of the essence of case law that succeeding precedents qualify each other and there are many analogies in municipal experience, particularly in the field of constitutional law in countries where constitutional matters frequently come before the courts, for situations in which there is wide scope for judicial discretion in determining which of a number of principles and precedents which qualify each other are to be regarded as applicable to the particular case. Every judicial system is continually remaking its traditions and jurisprudence. But the matter is of particular importance in the present stage of development of international adjudication and international law. It is both significant and reassuring that, in the main, modifications in what appears to be the original attitude of the Court have been in the direction of bringing its decisions into closer correspondence with the contemporary progress of international law. In such a situation problems of judicial method become, however, of primary significance. Lauterpacht has symbolized the recurring dilemma of the Court in his contrast between judicial caution (which includes judicial restraint, judicial hesitation and the appearance of judicial indecision) and judicial legislation.

In exercising constantly a choice between conflicting principles and, to some extent, conflicting precedents, the Court is naturally influenced by the imponderables of successive cases which include its evaluation of the weight to be attached at the time and in the circumstances of the case to certain considerations of international public policy. What part such considerations play and how far they operate consciously or unconsciously is necessarily conjectural and is a matter on which opinions may well differ. But it is difficult to reject completely the hypothesis that the Opinion of the Permanent Court of International Justice in the *Eastern Carelia Case* in 1923 was influenced by its reluctance, at a time when its advisory jurisdiction was a factor in the attitude of the United States towards possible participation in the Statute of the Court, to assume advisory jurisdiction without the full assent of States which might be affected thereby; when the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case* came before the International Court of Justice in 1950 no similar ground for hesitation existed. Similarly, the somewhat far-reaching rejection in the *International Commission of the River Oder Case* of 1929 of published preparatory work on the ground that some of the parties to the case had not participated in the negotiations may well reflect a 1929 attitude towards the method of negotiation of the 1919 peace settlement. In like manner the

opinion in the *Genocide Case* gives one the impression of being less concerned with the law of reservations as such than with genocide as a human and moral problem, arising from the evils of the Second World War, the nature of which led the Court to adopt as the inarticulate major premiss of its decision the desirability of securing the widest possible participation in the Convention on the subject. Or again, in the *Anglo-Norwegian Fisheries Case*, the 'felt necessities of the time' to which, in the tradition of Mr. Justice Holmes, the Court responded are perhaps to be found in the complex of economic and strategic considerations and difficulties confronting a small, exposed, relatively barren and valiant land. None of these considerations are in any sense improper; they are indeed all vital if the law is to keep in constant touch with life; but they emphasize the need for the highest order of judicial statesmanship in reconciling the claims of the authority and stability of the law as an essential element in any legal system with the considerations of public policy which no progressive legal system can afford to ignore.

The problem becomes particularly acute in cases in which the essential issue is how far the Court is prepared to attribute universal validity as evidence of custom to generally accepted practice.

'In few matters [Lauterpacht wrote] do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of international custom. The number and the importance of the States whose participation is necessary for the creation of custom; the presence of the conviction that the conduct in question is followed as a matter of legal obligation; the degree of relevance, in a particular situation, both of protest and of absence thereof; the determination whether the express adoption in treaties or otherwise of particular rules is expressive of existing or growing custom or whether the fact that the explicit adoption of such rules was deemed necessary points to the absence of custom—with regard to all these questions there are no clear limits to the comprehensiveness of judicial freedom of appreciation. . . . What is, in the language of Article 38 of the Statute, the degree of the requirement of generality of the "practice accepted as law"? To what extent is it accurate to maintain that sovereign States can be held bound by implied consent only under the irresistible impact of universal and not merely general acceptance of what are considered to be rules of law? Do departures from general practice, or claims inconsistent therewith, deprive such practice of its quality as binding custom not only in relation to the State or States departing from or objecting to that general practice, but absolutely? To what extent does it lie with one sovereign State—or a small number of them—to decline to be bound by general custom for the reason that it, or they, have refused assent to it?'

The answers which the Court ultimately gives to these questions will in large measure determine the future of international law in an age when far-reaching changes in the composition of and distribution of influence within the international community have introduced so much uncertainty. The *Lotus Case*, the *Reservations to the Genocide Convention Case*, the *Anglo-*

Norwegian Fisheries Case and the *Rights of Nationals of the United States in Morocco Case*, in all of which there were powerful dissenting opinions, may call for further consideration in this general perspective. One may reasonably hope that more frequent recourse to international adjudication will tend to settle rather than unsettle the law, but an overcautious attitude towards the judicial reception and recognition of custom may have the reverse effect. In this connexion the determination of *opinio necessitatis juris* may be of decisive importance. As Lauterpacht remarks:

> 'Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitatis juris* except when it is shown that the conduct in question was not accompanied by any such intention. The Judgment in the *Asylum Case* is not inconsistent with some such approach. The solution may not be altogether satisfactory, but it is probably more acceptable than the alternative method of exacting rigid proof of the existence of international customary law in a manner which may reduce to a bare minimum its part as a source of law. Of this, the decision in the *Lotus Case*, discussed below, provides an interesting example. While it is impracticable to demand positive proof of the existence of legal conviction in relation to a particular line of conduct, it is feasible and desirable to permit proof that in fact the *opinio necessitatis juris* was absent.'

A related problem arises when the Court hesitates or declines to consecrate with its authority a widely accepted principle or practice which it regards as calling for some modification in the light of contemporary needs. As illustrations we may take its unwillingness in the *Fisheries Case* to recognize the existence of a general rule of international law prescribing that the base line of territorial waters must follow the sinuosities of the coast or of such a rule laying down a ten-mile limit for the base line of territorial waters in the case of bays, and its unwillingness in the *Genocide Case* to recognize the rule that the unanimous consent of all signatories of a treaty is required for the validity of a reservation appended by a State desirous of becoming a party thereto. One can appreciate and share the desire to avoid petrifying legal rules which may have originated in circumstances which no longer exist or are rapidly changing, and the principal judicial organ of the United Nations and of the international community generally clearly has a special responsibility to be permanently conscious of new trends and tendencies and future needs in determining the law. Only a short generation ago—as is vividly illustrated by the work of Fischer Williams and Brierly—there was virtual unanimity among progressive international lawyers in regarding peaceful change as the crucial problem of international law and international organization. Such far-reaching changes have now occurred, largely as the outcome of forces released by

war but in many cases peacefully as between the parties directly concerned, that the emphasis of the problem has changed and we are less concerned to insist that provision for peaceful change is indispensable than to seek for a minimum of stability and continuity in a world with an unprecedented rate of change. In this context the Court may be called upon to choose between lending its authority to a widely accepted rule which no longer corresponds fully to contemporary needs and declining to recognize the binding force of such a rule at the price of lending its authority to the view that there is no clear rule of law on the subject and States are free to act in their discretion in the matter. Any such choice clearly calls for the broadest statesmanship. If the first alternative is chosen, we have, in respect of the matters at issue, to live with a body of law no longer fully appropriate to contemporary needs, until we can secure an agreed change in the law; if the second alternative is chosen, we have to live with a degree of uncertainty ranging, according to circumstances, from inconvenience through confusion to chaos, until we can secure agreement on a generally acceptable rule of law. The dilemma clearly does not permit of an unqualified answer either way. The weight to be attached to the conflicting factors to be evaluated may differ from case to case. But it is important that they should be instinctively recognized and should be evaluated with detachment and vision. When the dilemma is resolved in favour of the continuing legal validity of a rule which calls for change the Court may think it legitimate and appropriate to act upon a suggestion made by Lauterpacht that its duty to apply the law 'may not be incompatible with an expression of view as to the inadequacy of the law thus applied and the resulting moral duty of the parties—especially the successful party—to agree to, as good members of international society and in a spirit of neighbourliness, or to embark by common effort upon, such modifications of the law as appear necessary'. Such expressions of view by a court are not uncommon in municipal legal proceedings, and while there may be cogent reasons for the International Court acting with special restraint in drawing attention to the desirability of a change in the law such a practice may be preferable to the widespread uncertainty which may be created by a refusal to enforce the rule which the Court regards as outmoded.

Crucial as these outstanding problems are, a healthy preoccupation with them must not be allowed to obscure the vital importance of what has already been achieved, and is being further consolidated year by year, by the progressive substitution of international judicial precedent for formless and debatable custom. In depicting the contribution which the Court has already made to the development of the law and reviewing the problems of judicial method and craftsmanship which will affect so decisively its future contribution, *The Development of International Law by the International*

Court is complementary to *Private Law Sources and Analogies of International Law* and *The Function of Law in the International Community*. The three volumes constitute together what is in effect a trilogy on the place of the judicial process in international organization and the development of international law.

Recognition in International Law

Recognition in International Law, which appeared in 1947 and replaces a substantial number of earlier articles inspired largely by the Manchurian and Ethiopian wars and the Spanish Civil War, breaks different ground but pursues the same fundamental theme of widening the application of the rule of law. The book is divided into four parts of which the first three examine successively recognition of States, recognition of Governments, and recognition of belligerency and insurgency, while the fourth discusses problems of recognition. Its thesis throughout is that recognition is an act of law and not of policy and that acceptance of this concept of recognition is fundamental to the rule of law; it is a sustained and powerful plea for collectivizing the procedure of recognition in an appropriate international authority.

Recognition is 'the starting-point of international personality with all the rights pertaining thereto';[2] it is, therefore, Lauterpacht argues, disconcerting that, 'according to what is probably still the predominant view in the literature of international law', it is 'not a matter governed by law but a question of policy'; such a view implies that 'the very commencement of the legal personality of States and the question of their legal right to existence as such' are 'outside the orbit of international law'.[1] The practice of States supplies, however, a satisfactory basis for a different view which conceives of recognition as an act of law.

'There ought to be no doubt as to the urgency and the intrinsic justification of such principles. For the problem of recognition—not only of States, but also of Governments and of belligerency—touches the life of States in its most vital aspects. It confronts it, in the form of recognition of statehood, at the point of its emergence into the international arena; it faces the State, in connection with recognition of governments, at times of internal and external crises brought about by the revolutionary break in the legal continuity of its constitutional existence; and it confronts it in the shape of recognition of belligerency, at periods of violent commotions when on the battlefield of civil war the nation seeks a solution of intense clashes of creed and interests.'[2]

This alternative view may be summarized as follows:

'To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing States are under the duty to grant recognition. In the absence of an inter-

[1] p. 1. [2] p. 3.

national organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfil that function in their capacity as organs of international law. In thus acting they administer the law of nations. This legal rule signifies that in granting or withholding recognition States do not claim and are not entitled to serve exclusively the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfilment of a legal duty, is constitutive, as between the recognizing State and the community so recognized, of international rights and duties associated with full statehood. Prior to recognition such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted, by reference to compelling rules of humanity and justice, either by the existing members of international society or by the people claiming recognition.'[1]

It is contrary to international law to grant premature recognition *durante bello*, the question whether recognition is premature being one of fact.[2]

The essential requirements of statehood prescribed by international law are the existence of (1) an independent Government, (2) exercising effective authority, (3) within a defined area.[3] The existence of these conditions may be controversial but they are definite and exhaustive; they have nothing to do with the degree of civilization of the new State, with the legitimacy of its origin, with its religion, or with its political system. In according or withholding recognition on the basis of these criteria States are exercising a discretion determined by international law:

'In granting or refusing recognition the State administers international law; it does not perform a legally indifferent act of national policy. In the imperfectly developed international society States are often called upon to act in the fulfilment of a legal duty or in the assertion of their legal interest without being directly and immediately responsible to a higher authority. This does not mean that in these matters States are not bound by law at all. They enjoy freedom of decision in ascertaining the facts and assessing their significance. They are not free to assert the liberty to disregard the facts or to act in defiance of them.'[4]

It follows from the concept that recognition is a declaration of the existence of the requisite conditions of statehood that it is inconsistent with its function to use it as an instrument of bargaining for the purpose of securing particular national advantages and 'that it cannot properly be granted upon conditions (other than the implied condition that if the essential requirements of statehood cease to exist recognition may be withdrawn)'.[5]

Lauterpacht then examines the classical controversy between the constitutive and the declaratory views of recognition. He rejects both the constitutive and the declaratory views in their traditional form, the constitutive view on the ground that it is derived from the consensual theory of international law[6] and identified with the assertion of sovereignty in its most

[1] p. 6. [2] pp. 7–12. [3] pp. 26–31.
[4] p. 33. [5] p. 36. [6] pp. 38–41.

uncompromising form,[1] and the declaratory view on the ground that legal personality is a creature of law, not of nature, with the result that the determination of whether the conditions of its existence are satisfied is a question of judgment involving an element of discretion.[2] The principle of retroactivity of recognition as acted upon by the courts he regards as a further stumbling-block for both the constitutive and the declaratory doctrines.[3] His own view is that 'recognition, when given in the fulfilment of a legal duty as an act of application of international law, is a momentous, decisive and indispensable function of ascertaining and declaring the existence of the requisite elements of statehood with a constitutive effect for the commencement of the international rights and duties of the community in question'.[4] Recognition is declaratory of facts and constitutive of rights.[5]

It is, of course, anomalous that the recognizing State is in a dual position as an organ administering international law and as a guardian of its own interest.[6] The only solution of this dilemma lies in transferring the function of recognition 'to an international organ not impeded by a conflict between interest and duty';[6] such an innovation 'would also abolish the glaring anomaly of a community existing as a State in relation to some but not to other States'.[6] Lauterpacht acknowledges the difficulties:

> 'The collectivization of the process of recognition depends clearly upon the achievement of a high degree of political integration of the international community in the form of an international organization of States. Recognition of States, though consisting in the application of a legal principle and in the ascertainment of the existence of conditions of statehood as laid down by international law, could—and in view of its political implications, ought to—be placed within the competence of the highest executive and, to some extent, judicial bodies of the international organization. The thorough collectivization of the process of recognition in this way would be possible only if the international organization were both universal and compulsory, i.e. if it were an organization to which, by a sovereign act of international legislation, all States would be made to adhere and from which there could be neither withdrawal nor expulsion. An international organization which is not universal would make possible the collectivization of recognition only in the mutual relations of its members—though, politically, the authority of such recognition would extend outside the scope of its membership. In a universal international organization on a compulsory basis recognition by an appropriate majority of its highest organs would automatically involve membership. In an international organization which is not universal or in which membership is voluntary, admission by the competent organ of the organization would automatically involve recognition by all the members of the organization.'[7]

In view of the weighty political objections 'to conferring upon the international judiciary the power to grant recognition on the application of the community claiming it'—a decision which may be 'tantamount to decreeing a radical computation or dismemberment of the territory of a State'—it is

[1] p. 62. [2] pp. 45–51. [3] p. 57. [4] p. 51.
[5] pp. 75–76. [6] p. 67. [7] pp. 67–68.

more appropriate 'that that particular function of applying the law should be performed not by the judicial but by the highest executive organs of the international community'.[1]

The recognition of Governments is governed by essentially similar principles and considerations:

'It is a fundamental rule of international law that every independent State is entitled to be represented in the international sphere by a government which is habitually obeyed by the bulk of the population of that State and which exercises effective authority within its territory. To deny that right to a State is to question its independence. For this reason States are not normally concerned with the changes in the composition or in the form of government which occur in other countries; the international personality of the State is not affected by transformations of that kind. This applies to changes taking place both in conformity with and in violation of the constitutional law of the State in question. However, as in the latter case the replacement of one government by another is often accompanied by revolutionary upheavals in the form of civil wars of differing degrees of intensity and duration and by competing assertions of power on the part of rival authorities, outside States are frequently called upon to take a decision on the question which of the contesting parties must be regarded as being the government of the country concerned. Or, after the hostilities have ceased, they may have to decide whether the authority which for the time being has triumphantly asserted itself over its opponents may properly be considered to be a government. To take a decision of this nature is to recognize—the government in question. When that government enjoys, with a reasonable prospect of permanency, the habitual and—though this is controversial—willing obedience of the bulk of the population, outside States are under a legal duty to recognize it in that capacity. For this reason, although, according to the law of most countries, recognition of foreign governments falls within the purview of the executive department of the State, it is a function consisting in the application of a rule of international law to given situations of fact. Like recognition of States, recognition of governments is a subject affirmatively governed by international law.'[2]

While recognition is frequently described as a political function, Governments in fact normally act in the matter on the basis of principle:

'The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law. In relation to recognition these facts may be either independent statehood, or effective governmental control, or hostilities waged on a large scale between rival factions within a foreign State. With regard to recognition of governments, that principle of the law-creating effect of facts signifies that a government effectively established within national territory and, according to some, sanctioned by adequately expressed popular approval must, notwithstanding its revolutionary origin, be regarded as representing the State in question and as such entitled, in law, to recognition. It is of the essence of the notion of independence of States that changes in the structure or in the composition of their governments are, in international law as at present constituted, an internal question of the States concerned and that foreign States are not, in general, entitled to interfere in

[1] pp. 69–70. [2] pp. 86–87.

the matter by raising the question of recognition or by refusing to grant it. The position is the same when the change is of a revolutionary character and accompanied by violence—although in that case the question often arises whether the new government, based as it is on force in the first instance, is an effective government with a reasonable prospect of permanency and although it is that question which makes recognition necessary. Apart from this, the nature of the change is of no legal relevance. This is so for the simple reason that, so far as international law is concerned, the legality or otherwise of the revolution is a matter of indifference. If revolution were an unlawful act in international law, it would produce no results valid in the international sphere; its factual success could not prevail against the unlawfulness of its origin. But international law does not prohibit revolution as a means of constitutional or purely governmental change within the State. From the point of view of foreign States and of international law generally, there is, in principle, no difference between a constitutional and a revolutionary change of government. Within the State the revolution destroys irrevocably the continuity of the legal system; the former law subsists only in so far as it is adopted by the new, revolutionary order. It is, in fact, international law which preserves the legal continuity of the State. It does so by laying down the rule that the State and its obligations remain the same notwithstanding constitutional or governmental changes, revolutionary or other. This is a principle which goes back to Grotius.'[1]

The future development of international law and international organization may wholly transform the position on the basis of an international guarantee of both human rights and constitutional processes, but no such transformation has yet occurred:

'It is possible that in the ultimate rational development of the political organization of mankind rebellion against national authority will appear in an altogether different light. When that happens international law will fulfil functions of a scope infinitely wider than it does at present. It will render unlawful not only international but also civil war in a way comparable to the suppression of civil war within the component territories of the member States of a Federal State as the result of the guarantee, in the Federal Constitution, of the fundamental rights of the individual. The final political organization of mankind will signify the incorporation of these rights as an organic part of the constitution of the international commonwealth in a manner similar to that in which Section 4 of Article IV of the Constitution of the United States provides that the latter "shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence". In so far as civil war is due to a disregard or suppression of those rights, it will be eliminated as the result of the constitutional guarantees provided by the *civitas maxima* and enforced by judicial review and executive action. In the meantime, the rules of international law relating to recognition of governments cannot be framed on the assumption that that consummation has already come to pass.'[2]

International law in its present stage of development is based on the principle 'that the revolutionary government which wields effective power, with a reasonable prospect of permanency, over the whole—or practically the whole—territory of the State is entitled to recognition'. Certain earlier

[1] pp. 91–93. [2] p. 93.

tests of recognition, such as 'legitimacy in its primary meaning as referring to the lawful origin of the new government in relation to the constitutional law of the country',[1] inhumanity of revolutionary methods,[2] and the willingness of the new Government to give an undertaking to fulfil international obligations,[3] may be regarded as having been discarded. Lauterpacht's comment on the third of these discarded tests is of special interest:

'The soundness and propriety of the test of willingness to fulfil international obligations as a condition of recognition are questionable for a number of reasons. It is difficult to see why, in law, the mere fact of the advent of a new government should cause other States to raise the issue of the fulfilment of obligations incurred by or binding upon its predecessor. These obligations are in any case binding, within reasonable limits, upon the new government by virtue of the well-established principle of the continuity of the State regardless of changes in the composition of its governments. It does not, in law, lie within the power of the new government to repudiate the obligations of its predecessor. Recognition in face of any attempted repudiation of obligations does not amount to acquiescence in what is clearly a breach of international law. At the same time, the refusal of recognition on that account deprives the injured State of the opportunity of seeking legal redress through the ordinary channels. The more satisfactory course would appear to be to grant recognition and then to insist by such means as international law permits on the fulfilment by the new government of its international obligations.'[4]

The requirement of the subsequent legitimation of the revolutionary Government through an adequately expressed act of popular approval is, in Lauterpacht's view, on an altogether different footing and should be regarded 'as insistence on proper evidence of effectiveness'.[5] Such a requirement was a persistent feature of British and somewhat less consistently of United States practice for a century until the period following the First World War;[6] the relaxation of their traditional attitude by Great Britain and the United States during the inter-war period should be regarded as 'a temporary adaptation to a transient period of political retrogression'[7] which does not preclude its re-emergence accompanied by appropriate international safeguards. While reminiscent in some respects of the test of legitimacy, the requirement of the subsequent confirmation of the revolutionary régime is essentially a negation of that test inasmuch as it rejects the view that the revolutionary character of the change renders the new régime irrevocably invalid. 'For the test of subsequent legitimation of the revolution by an expression of popular consent is not a denial of the test of effectiveness. It is a combination of the test of effectiveness with the requirement of specifically conceived evidence of the effectiveness of the revolutionary régime.'[8]

Whatever the test applied, recognition of Governments, given the

[1] p. 98. [2] pp. 106–8. [3] pp. 109–14. [4] pp. 110–11.
[5] p. 115. [6] pp. 116–36. [7] p. 139. [8] p. 140.

required conditions of fact, is a matter of legal duty and a necessary consequence of the principle of State independence:

'To deny recognition to a government possessing the necessary qualifications is not only to question the independence of the State concerned; it is to deprive that State, to a substantial extent, of its status as a subject of international law. This result manifests itself mainly with regard to the position of the unrecognized government before foreign tribunals—a matter which is discussed more fully in this chapter. But the consequences of non-recognition show themselves in many other ways; they are, for most practical purposes, identical with the refusal to recognize the State as such. Existing treaties, it is true, remain in force. However, as their operation presupposes normal intercourse between the States in question, they remain in most instances inoperative; on occasions they have been expressly denounced by the State refusing recognition. As treaties regulate most of the current relations of States, the refusal to recognize a government amounts to a considerable extent to exclusion from the benefits of international intercourse. The unrecognized government is, before foreign courts, denied access to and the right to dispose of State property situated abroad. Its agents, if it attempts to send any, are treated like ordinary individuals. The unrecognized government does not enjoy that measure of protection in case of civil war which international law grants to recognized governments. At least, according to the British practice, it is denied the right to ordinary jurisdictional immunities; in practically all countries it is denied the right of access to courts. Legal effect is refused to the acts of its legislative and other authorities. It is prevented from obtaining loans and other economic facilities. Its right to declare war and to conclude peace has been questioned. On occasions these legal consequences of non-recognition have been amplified by announcements issued by the executive department to the effect that no diplomatic protection would be granted to nationals in respect of their dealings with the unrecognized authority.'[1]

There are, however, good reasons for the principle that the executive and the judiciary must speak with one voice on matters relating to recognition as on other matters relating to the external relations of the State, and so long as the principle of effectiveness is respected and recognition is not arbitrarily withheld for political reasons 'there is probably no merit in the view that after one organ of State has declared that an authority claiming to be the government of a foreign country does not in fact exist and is therefore not entitled to recognition, another organ of the State should attribute a legal existence to that body and should treat it as entitled to the rights ordinarily enjoyed by a foreign government'.[2]

The general conclusion which Lauterpacht draws from his analysis of the practice is that it does not support the assertion that recognition of Governments is purely a matter of policy. 'Undoubtedly, the act of recognition permits and necessitates the exercise of discretion in ascertaining the existence of the requisite conditions of recognition in situations which are complicated and liable to sudden changes. But to exercise discretion of this nature is not to perform an act of policy.'[3] There are,

[1] pp. 142–5. [2] p. 155. [3] p. 158.

nevertheless, grave disadvantages in the existing position whereby the function of recognition is exercised in an unco-ordinated manner by individual States.

'The disadvantages of the existing decentralization of the function of recognition of governments are almost the same as in the case of recognition of States. The possibility of the abuse of the power of recognition for the direct purpose of obtaining national advantages; the occurrence, whose frequency in no way diminishes its absurdity, of an authority being recognized as a government by some States but not by others; the responsibility, which is often an invidious one, of determining which of two rival factions is entitled to recognition; the difficulty of forming an accurate judgment as to the facts of the situation—all these factors point to a measure of collectivization of the process of recognition as a rational and desirable development.'[1]

Where the proper exercise of the function of recognition depends on the ascertainment of local facts 'the diplomatic representatives in the capital of the country concerned would seem, when acting jointly, to be a useful instrument for that purpose'[2]; for this purpose they should act through some committee set up for the purpose, 'as a fact-finding and advisory body to assist in the decision any international political or judicial agency endowed with jurisdiction on the subject of recognition'.[3] Practice also affords examples of collective recognition (usually by the Great Powers) and of consultation with a view to parallel, if not joint action.[3] In so far as the function of recognition consists in the exercise of a legal judgment on the basis of the ascertainment of facts it can be regarded as an appropriate function to entrust to the highest international judicial authority, but the political implications of recognition as well as the necessity of expeditious action 'would seem to favour the exercise of that function by a political organ subject to the assistance of the court on such matters of law as may be relevant to the issue'.[4]

The recognition of belligerency is governed by the same basic principle as the recognition of States and Governments:

'The essence of that principle is that recognition is not in the nature of a grant of a favour or a matter of unfettered political discretion, but a duty imposed by the facts of the situation. Given the required conditions of belligerency as laid down by international law, the contesting parties are legally entitled to be treated as if they are engaged in a war waged by two sovereign States. This view is accepted by what is probably the majority of writers. It has the support both of the practice of governments and of considerations of principle. The law cannot refuse to acknowledge the legal consequences of facts which are not in themselves unlawful and which, as between sovereign States, normally give rise to legal rights and obligations. Armed rebellions and civil wars which create the occasion for recognition of belligerency are not acts or situations prohibited by international law.'[5]

[1] pp. 165–6. [2] p. 166. [3] p. 167.
[4] p. 169. [5] p. 175.

The required conditions of belligerency are specified by international law:

'There is general agreement as to the nature of the conditions which impose the duty of recognition of belligerency—or which, according to others, justify recognition of belligerency. These conditions are as follows: first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency. Recognition of belligerency is in essence a declaration ascertaining the existence of these conditions of fact.

'To grant recognition of belligerency when these conditions are absent is to commit an international wrong as against the lawful government. The same applies to the premature recognition of belligerency. To refuse to recognize the insurgents as belligerents although these conditions are present is to act in a manner which finds no warrant in international law. The fact that the parent State has recognized or treated the insurgents as belligerents constitutes a strong presumption that there are present the first three conditions referred to above; these, when combined with the fourth requirement, impose upon outside States the duty of recognition.

'Of these principles the only one which is generally admitted is that relating to the duty owed by outside States to the parent State not to grant recognition when the four conditions referred to above, or any one of them, are absent. Others are controversial.'[1]

Lauterpacht proceeds to substantiate these propositions by an exhaustive survey of British and United States practice,[2] illustrated by a large selection of law officers' opinions. His conclusion on the whole matter is that 'as in the corresponding cases of recognition of States and governments, so also in the case of belligerency, recognition, while declaratory of existing conditions of fact is constituent of the rights and duties of belligerency' that 'because of its constitutive character it must, as a matter of principle, be regarded as taking place in fulfilment of a legal duty as distinguished from an act of policy ministering exclusively to the interests of the State concerned', and that 'the same considerations which in the matter of recognition of States and Governments militate in favour of the collectivization of the process of recognition apply also to recognition of belligerency'.[3] Only by collective action can the inconveniences of contradictory national policies influenced by divergences of national interest and outlook be avoided.

'For these reasons the rational development of the process of recognition of belligerency lies in the conferment upon an international authority of the right to determine, on the application of any interested State or of the insurgents, whether the objective requirements for recognition of belligerency exist in any particular case. The practice of States is not devoid of examples approaching some such collectivization of the process of recognition of belligerency. Of these the plan propounded by the States

[1] pp. 175–6. [2] pp. 176–253. [3] p. 253.

signatories to the Non-Intervention Agreement of 1936 in the course of the Spanish Civil War is the most instructive. It might be said that in view of the rule that recognition of belligerency is unlawful unless the interests of the State in question necessitate a definition of its relations to the contest, it does not lend itself to uniform collective action. The answer is that the collectivization of recognition would to a large extent render obsolete that particular test of recognition. Its generality would render it immune from the charge of having as its sole purpose a gratuitous manifestation of support for the cause of the insurgents.

'Although the collectivization of the process of recognition of belligerency must be viewed as a rational and desirable consummation, it cannot be regarded as the final achievement at which international law ought to aim in this matter. The ultimate development cannot fall short of the attitude of international law to war in general. If and when war is effectively renounced between States as an instrument of national policy, recognition of the full belligerent status of the parties to civil wars will become an incongruous anachronism. On the other hand, the elimination of civil wars as an institution regulated by the law of nations is conditioned by such a measure of international supervision over and of protection of constitutional systems of States, in pursuance of an effective international recognition of the fundamental rights of man, as seems remote at present. Yet we are not at liberty to relegate the possibility of that development to the domain of an unattainable ideal. The Charter of the United Nations has constituted "human rights and fundamental freedoms" a matter of international concern.[1] The way has thus been opened for the ultimate acknowledgment of these rights and freedoms—including the inalienable right of man to government by consent —as an effective part of international law. When that consummation comes to pass, the present attitude of indifference of international law towards civil wars will be deprived of its moral and legal foundations. Civil war will become the object of international condemnation and suppression in the same way as war between sovereign States. The law relating to recognition of belligerency will then become a subject of legal history.'[2]

Insurgency, unlike belligerency, is not a well-defined legal status, with rights and duties incidental to that status.

'It is not a relation the elements of which are determined by the law in advance. So far as outside States are concerned it may range from a simple decision to abstain from treating the rebels as law-breakers pure and simple to a measure of regularized intercourse indistinguishable from that maintained with the lawful government. For this reason, any attempt to lay down the conditions of recognition of insurgency lends itself to misunderstanding. Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest.'[3]

Insurgency is indeed a status so elastic that it ranges from treatment in most respects as the Government of an independent State to treatment as pirates.[4]

Recognition presents a series of problems of which Lauterpacht singles out for special examination *de facto* recognition, the withdrawal of

[1] See the Preamble to the Charter and Articles 1 (3), 13 (1) (*b*), 55 (*c*), 62 (2), 68, 76 (*c*).
[2] pp. 254–5. [3] pp. 276–7. [4] pp. 295–310.

recognition, conditional recognition, implied recognition and the principle of non-recognition.

De facto recognition was a device adopted at the time of the secession of the Latin American republics from Spain and Portugal 'the distinguishing feature of which was that it did not purport to express an attitude with regard to the legal merits of the claim to independence and to the title of the parent State'.[1] Apparently not used again during the nineteenth century[2] it has become a commonplace in the twentieth. *De facto* and *de jure*, when used in relation to recognition, are 'terms expressive not of any judgment upon the legitimacy of the recognized authority from the point of view of the constitutional law of the State concerned, but upon its claim to be considered as validly and effectively representing the State or territory in question in the field of international law'.[3] The distinction between *de jure* and *de facto* recognition 'is altogether unrelated to the question of the legality, from the point of view of internal constitutional law, of the new State or government';[4] it refers 'not to any conformity with the internal law of the State but to the requirements of international law'.[5] The principal condition of recognition of both States and Governments is effectiveness of power within the territory of the State, but in practice certain other conditions, such as a reasonable prospect of permanency and stability in the case of new Governments and the final and irrevocable defeat of the pretensions of the parent State in the case of new States have also been generally admitted. Other conditions, 'such as the free acceptance of the new régime by the majority of the population, or the ability or willingness to fulfil international obligations, although more controversial and, occasionally, less capable of supplying a working test of recognition, have nevertheless found a place in the practice of States' not as a matter 'of political bargaining and convenience' but 'as representing, in the view of recognizing States, proper conditions of recognition as laid down by international law'.[6] *De facto* recognition 'is a declaration that the body claiming to be the government of an established or a new State actually wields effective authority without, however, satisfying other conditions of full, *de jure*, recognition'.[7] *De facto* recognition 'takes into account the actuality of power while expressly refusing to admit its legality in the field of international law'.[8] As such it may have a relationship to the principle of non-recognition:

> 'The attitude of non-recognition cannot, in the nature of things and without giving rise to international complications over a prolonged period, be an instrument of effective pressure in the economic and cognate fields. Its purpose is an expression both of moral disapproval and, in law, of reservation of freedom of action in relation to a

[1] p. 331. [2] pp. 331–2. [3] p. 330. [4] p. 336.
[5] p. 337. [6] p. 339. [7] p. 340. [8] p. 341.

change brought about by means contrary to international law and expressly declared to be illegal. An attitude of this kind may be compatible with *de facto* recognition. The provisional character of the latter emphasizes the absence of any obligation to continue the recognition. It stresses the irregularity and the illegality of the new situation. As such it may be deemed to be compatible with the limited purpose of the necessarily imperfect sanction of non-recognition.'[1]

De facto recognition normally involves recognition of the validity of the internal acts, legislative and otherwise, of the recognized authority, and the grant of jurisdictional immunity, but does not convey title to property situated abroad.

Lauterpacht rejects the view that recognition cannot be withdrawn as unsocial in principle and inconsistent with practice:

'In principle there would seem to be no reason why recognition should not be liable to withdrawal so long as that act, like that of granting recognition, is conceived not as an arbitrary act of policy but as one of application of international law, namely, as a declaration that the objective requirements of recognition have ceased to exist.

'Recognition—whether of States, governments or belligerency—is a declaration that there exist the requirements of international law, as ascertained *bona fide* by the recognizing State, with regard to the particular category of status. Recognition is not a contract or grant. It is a declaration of capacity as determined by objective facts. These facts are not necessarily enduring. A State may lose its independence or the necessary degree of cohesion as an organized community; a government may cease to wield effective authority; a recognized belligerent may be utterly defeated. In all these cases the basis of recognition disappears, and outside States are entitled and bound to take cognizance of that fact.'[2]

Severance of diplomatic relations is not, however, tantamount to withdrawal of recognition.[3] There is, moreover, a distinction in respect of liability to withdrawal between *de jure* and *de facto* recognition; whereas *de facto* recognition 'is provisional and subject to withdrawal if the conditions of recognition, as laid down in international law, cease to exist or if the conditions still to be fulfilled at the time of recognition fail to materialize',[4] *de jure* recognition 'at the time when it is given, partakes of a finality which can be destroyed only in exceptional cases and subject to exacting proof'.[4]

The imposition of conditions in consideration of recognition has been an exceptional occurrence. 'Recognition has occasionally, though not frequently, been granted subject to the new State or government undertaking an obligation such as the concession of most-favoured-nation treatment or of other commercial advantages, settlement of outstanding claims, abstention from and suppression of trade in slaves, respect of private property, proper treatment of minorities, or some line of conduct with regard to a specific situation.'[5] Though the term 'conditional recognition' has been used in such cases, the so-called conditions are in fact collateral obligations rather than conditions in the accepted legal sense of the term a breach of

[1] p. 348. [2] pp. 349–50. [3] p. 355. [4] p. 357. [5] p. 358.

which would affect the validity of the recognition. Any such conditions would be objectionable as being contrary to the true function of recognition as a determination of the facts.

In Lauterpacht's view 'the doctrine of implied recognition has been more conspicuous in the writings of authors than in the practice of States'.[1] The governing principle is that 'there is, as a rule, no conduct, however conclusive in ordinary circumstances, the normal legal consequences of which cannot be averted or interpreted by a clear manifestation of a contrary intention'.[2] This principle is specially weighty in a matter as important as recognition. 'Recognition is primarily and essentially a matter of intention. Intention cannot be replaced by questionable inferences from conduct. Such inferences are particularly inappropriate when the general attitude of the State in question points to its continued determination to deny recognition.'[3] Any general attitude of non-recognition reduces the operation of the doctrine of implied recognition 'even below the modest limits which can otherwise be assigned to it' with the result that 'particularly exacting evidence of recognition is required in the case of States which have declared themselves to be pursuing a policy of non-recognition or, even more so, as being bound by an obligation of non-recognition'.[4] These general principles lead to the following conclusions as regards the various alleged forms of implied recognition.

'There is no implied recognition in the fact of a State becoming a party or continuing as a party to a multilateral treaty to which an unrecognized State is or becomes a party. Neither does that effect attach to participation in an international conference attended by an unrecognized State or government; to retention and continued maintenance (as distinguished from appointment), for an interim period, of diplomatic representatives; to retention, replacing, sending and reception of consuls and, possibly, though this is controversial, to a request for and acceptance of an exequatur for them (as distinguished, probably, from the issue of an exequatur); to the sending of agents and representatives not possessing diplomatic character; to the fact, form and manner of communication with and address of foreign authorities, especially in connection with the protection of nationals; to request for and grant of extradition; to the maintenance of contact with the insurgents in a civil war; to admission to an international organization such as the United Nations. Such controversial evidential value as may otherwise attach to any of these acts is further reduced, if not altogether eliminated, by the proclaimed assumption of a policy or of an obligation of non-recognition. A State committed to such policy or obligation is bound to choose an express and unequivocal mode of recognition if it wishes to depart from its general policy as publicly announced. The only legitimate occasions for implying recognition are: (1) the conclusion of a bilateral treaty which regulates comprehensively the relations between the two States (and which must be distinguished from temporary arrangements and agreements for limited purposes); (2) the formal initiation of diplomatic relations and, probably, the issue of consular exequatur; and (3), in the case of belligerency, a proclamation of neutrality or some such unequivocal act.'[5]

[1] p. 370. [2] p. 369. [3] p. 371. [4] pp. 395–6. [5] pp. 405–6.

As a matter of future policy it is desirable that the function of recognition should be freed from the vicissitudes of the individual action of States and that collective recognition should become a rule of international law and organization, but 'pending that consummation it is imperative that the science of international law should free the doctrine of recognition from the exaggerations of the notion of implied recognition which find no support in the practice of States and which are inimical to that minimum of intercourse which is often unavoidable even in the absence of recognition'.[1]

The duty of recognition extends only to facts and situations which are not stigmatized by international law as unlawful. Secession, rebellion and civil war constitute a breach of the law of the State concerned but are not contrary to international law;[2] they therefore do not impair the duty of recognition of facts and situations resulting therefrom. Facts resulting from conduct violative of international law do not impose on other States a similar duty of recognition:

> 'They do not impose upon other States the duty of recognition. These may, if they so wish and if, in exceptional circumstances, they deem it compatible with the maintenance of the authority of international law, recognize them as creating internationally valid rights as against themselves. If they do so, it is a concession on their part which they are under no duty to grant. On the other hand, they may announce their intention to treat in the future such unlawful acts as devoid of any validity in international law. They may go further and obligate themselves in a mutually binding instrument not to validate as part of international law the consequences of an unlawful act. Such a duty of non-recognition may follow indirectly from obligations of a different character previously undertaken. This distinction between acts consistent with and those contrary to international law enables us to understand the principle of non-recognition in terms of the general doctrine of recognition conceived as an act of application of international law.'[3]

Refusal to recognize titles, treaties and situations on the ground that they are inconsistent with the rights of the State refusing recognition is a feature of international practice of long standing.[4] The transformation of a policy of non-recognition leaving the State adopting it full freedom of action for the future into the acceptance of collective obligations of non-recognition of situations, treaties and agreements brought about by means contrary to international law is a new feature of international practice initiated by the Council and Assembly of the League of Nations in 1932 in connexion with the invasion of Manchuria by Japan.[5] It poses the problem of reconciling the principle *ex injuria jus non oritur*, which is well established in international law and has been applied by the International Court in varied contexts,[6]

[1] p. 408. [2] p. 409. [3] p. 410. [4] pp. 414–16. [5] pp. 416–20.

[6] *Free Zones Case, P.C.I.J.*, Series A, No. 24, p. 16; *Jurisdiction of the Courts of Danzig Case, P.C.I.J.*, Series B, No. 13, pp. 26, 27; *Chorzów Factory Case, P.C.I.J.*, Series A, No. 9, p. 31; *South Eastern Territory of Greenland Case, P.C.I.J.*, Series A/B, No. 48, p. 285; *Legal Status of Eastern Greenland Case, P.C.I.J.*, Series A/B, No. 53, p. 75.

with the far-reaching qualification of that principle expressed in the rival maxim *ex factis jus oritur*:

'International law, being a weak law, is fully exposed to the impact of the phenomenon to which jurists have referred as the "law-creating influence of facts". But unless law is to become a convenient code for malefactors, it must steer a middle course between the law-creating influence of facts and the principle, which is the essence of law, that its validity is impervious to individual acts of lawlessness. Law is a body of rules operating under the aegis of a system of force actually operative in society. This does not mean that all breaches of the law, if successful, become part of the legal order. A balance must be achieved somewhere. It cannot be found in the immediate validation of the illegal act; it must be sought in considerations of a general nature which would justify the legislator in incorporating the result of the illegality as part of the law. In the absence of such incorporation, a provisional balance may be found, in the international sphere, in *de facto* recognition combining the necessities of international intercourse with the maintenance of an essential legal principle.'[1]

Illegality may be validated by prescription (but not immediately), by consent of the injured party (but not where the wider interests of the community of States are involved), or by recognition, which affords a 'possibility of curing the invalidity of the results of the unlawful conduct by recognition on the part of States proceeding, as it were, as organs of the international community'.[2] Such a course may be preferable to the perpetuation of an anomaly:

'There is nothing obnoxious to legal principle in the idea of legalizing in this way the results of wrongful conduct. . . . There is no question here of legalizing the illegal act; the question is one of disregarding the effects of the illegality. The results of an illegal act are a legal nullity; they are legally non-existent. The wrongdoer acquires no right under it. But there is no logical objection to the community acquiescing, through collective or individual acts of its members acting in the general interest, in the assertion of a right which did not previously exist. To rule out that possibility altogether would mean to postulate for the law a degree of rigidity which may not be compatible with international peace and progress. Occasions may arise when the continuation of the policy or the obligation of non-recognition may not be conducive to the general good. When that happens, non-recognition may be adjusted to the requirements of peace and stability. It may merge in a general international settlement, as distinguished from individual acts of recognition resulting from opportunism, from a complacent claim to a sense of realities, or from less worthy motives of direct political or commercial advantages. There is a difference between this manner of recognition on general grounds and the almost automatic incorporation of any successful breach of international law as part of the law of nations on the ground that the law must follow the facts. Law follows facts which are not unlawful. When they are unlawful, and in particular when their illegality consists in acts of aggression against the very life of other members of the community in deliberate disregard of fundamental legal obligations of conduct, a heavy and most responsible burden of proof falls upon those embarking upon the legalization of the effects of illegality. Recognition of the effects of illegality may be a wise weapon of international policy or a bitter pill of unavoidable political necessity.

[1] p. 427. [2] p. 429.

Its merits in any particular case are not a matter for legal judgment so long as it is clear that in the opinion of those taking the decision non-recognition of the fruits of lawlessness is and remains an essential principle of law.'[1]

Seen in this perspective and assuming his views concerning *de facto* and implied recognition, Lauterpacht takes the position that the principle of non-recognition can contribute to upholding the authority of international law without constituting in a disproportionate degree an impediment to international intercourse: 'Law is not necessarily disintegrated by impotence; but it is destroyed by unqualified submission to the lawlessness of force. Non-recognition prevents that contingency. For this reason, so long as there is no assurance that international law will be enforced invariably and effectively by ordinary processes, non-recognition is a legal principle of value.'[2]

Recognition in International Law is an unusual book in that it combines the most authoritative survey available of the established practice of States on the subject with a searching analysis of principles and a sustained plea for far-reaching developments in future practice. There may be some divergence of view concerning the extent to which the different elements in its thesis are wholly compatible with each other, both in logic and in practice. It requires a certain refinement of approach to maintain in equilibrium the concepts of a duty to recognize on the basis of an objective assessment of the fulfilment of requirements of recognition, of a discretion to be exercised in accordance with a legal duty, of an obligation of non-recognition of changes resulting from the violation of certain obligations, of an international procedure for legalizing the results of wrongful conduct, of a predisposition to deny implied recognition, and of the acceptance of *de facto* recognition as a compromise between the principle of effectiveness and the obligation of non-recognition of changes effected in violation of international law. All of these elements are important to a developed law of recognition, but it may be that they cannot be fully reconciled until a collective procedure of recognition has been developed within the framework of a more orderly international society in which both human rights and constitutional processes are effectively protected by international guarantees.

This general concept, to which Lauterpacht repeatedly subscribes, furnishes a natural link between *Recognition in International Law* and *International Law and Human Rights*.

International Law and Human Rights

International Law and Human Rights appeared in 1950 and in effect supersedes an earlier book of 1945 entitled *An International Bill of the Rights of Man*, a 1947 course of Hague lectures on 'The International

[1] pp. 429–30. [2] p. 435.

Protection of Human Rights',[1] a 1948 report to the International Law Association,[2] and a number of articles.[3] Approximately half of the volume (comprising Part I, Section 2 of Part II and the introductory chapter and concluding paragraphs of Part III) is a discussion of general principles of permanent importance; the other half (comprising Section 2 of Part II and the greater part of Part III) is both more controversial and liable to prove less impervious to the passage of time.

Part I of the book is a discussion in the broadest perspective of the place of human rights in international law 'against the wider background of the problem of the subjects of international law and of the interaction of the law of nations and the law of nature in relation to the enduring issue of human government—the securing of the natural and inalienable rights of man'.[4] Lauterpacht emphasizes at the outset the importance of approaching the problem against this wider background:

'. . . if the provisions of the Charter relating to human rights are to be adequately interpreted, they must be read against the broad background of the position of the individual in international law. If we remain hidebound by the traditional approach to that question we shall be inclined to see in the Articles of the Charter bearing upon human rights an artificial innovation altogether divorced from previous practice and out of keeping with the natural framework of international law. Our interpretation will accordingly be hesitant and restrictive. If, on the other hand, we contemplate these Articles of the Charter, fundamental and epoch-making as they are, as rooted in a substantial body of practice and as not inconsistent with the essential structure of international law, we shall have removed an obstacle of some importance in the way of giving full scope to a crucial purpose of the Charter of the United Nations. The interpretation of the Charter in that matter depends to a substantial degree upon the realisation that there is no rule of international law which definitely precludes individuals and bodies other than States from acquiring directly rights under or being bound by duties imposed by customary or conventional international law, and that the developments of the last quarter of a century have translated that capacity, in many fields and in respect of both rights and duties, into part of positive law. As a result of the Charter of the United Nations—as well as of other changes in international law—the individual has acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right. For in so far as international law as embodied in the Charter and elsewhere recognises fundamental rights of the individual independent of the law of the State, to that extent it constitutes the individual a subject of the law of nations. There is nothing in what is often referred to as the structure of international law which prevents that result from being achieved.'[5]

The traditional doctrine that only States are subjects of international law is not supported by contemporary State practice.

[1] *Recueil des Cours*, 70 (1947—I), pp. 5–107.

[2] *International Law Association, Report of the 43rd Conference* (Brussels, 1948), pp. 74–138.

[3] E.g. 'The Universal Declaration of Human Rights', in this *Year Book*, 25 (1948), pp. 354–81; 'The Law of Nations, the Law of Nature and the Rights of Man', *Transactions of the Grotius Society*, 29 (1943), pp. 1–33.

[4] p. vii.

[5] pp. 3–4.

'International practice shows that persons and bodies other than States are often made subjects of international rights and duties; that such developments are not inconsistent with the structure of international law; and that in each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law.'[1]

Apart from such historical exceptions as insurgents, whether or not recognized as belligerents, the Holy See and the British Dominions before they had attained full statehood, 'it is now generally agreed that public international bodies created by agreement among States are capable of possessing an international personality distinct from that of the States which compose them';[2] the procedural capacity of such bodies before the International Court of Justice may be incomplete but provision has been made for their participation in proceedings before the Court[3] and in the case of the United Nations the Court itself, in the *Reparation for Injuries Case*,[4] has affirmed its possession of 'a large measure of international personality and the capacity to operate on an international plane'.[5] These developments are symptomatic of the inadequacy in meeting the developing needs of international society of the traditional doctrine according to which States are the exclusive subjects of international law:

'A purely formal international law concerned with war, with delimitation of jurisdictional competence and with ceremonial, could limit itself to the narrow and selected circle of sovereign States. In modern international society the interests to be protected and regulated can no longer be entrusted exclusively to States. These interests call for the recognition of new subjects of rights and duties conceived as the rational means of international social welfare. In this sense the question whether international public bodies are subjects of international law is not one of mere doctrine. Nor is it merely a question of making them capable of enjoying jurisdictional immunities, or of securing for them the benefits of a uniform legal régime. The problem is rather one of not permitting the dead hand of an obsolete theory to continue to lie heavily upon the development of international organisation. It is a question of meeting satisfactorily the requirements of an expanding and developing law not limited to the niceties of international intercourse but concerned with the well-being of the individuals as the ultimate units of human society and with the adequacy of the instruments which serve their needs. We can hope to gain an accurate approach to an understanding of the nature of modern international law only if we discard the notion that it regulates exclusively the relations of States and realise that it is concerned with interests which are in need of regulation on account of the existence of independent States constituting the international society. These interests are not co-extensive with the external relations of States.'[6]

[1] p. 12.

[2] p. 14; and see Jenks, *Corporate Personality for International Purposes* (in preparation).

[3] pp. 16–17; and see Jenks, 'The Status of International Organisations in Relation to the International Court of Justice', *Transactions of the Grotius Society*, 32 (1946), pp. 1–41.

[4] *I.C.J. Reports*, 1949, p. 174.

[5] Ibid., at p. 179.

[6] pp. 18–19; and cf. Jenks, *The Common Law of Mankind* (1958), especially 'The Scope of International Law' at pp. 7–61.

More tentative developments have occurred in the position of private international organizations as the result of the grant of consultative status by the United Nations and other international public bodies;[1] these are of less significance but indicate a general direction of development.

It is in the context of these developments that we must examine the position of the individual as a subject of international rights and duties. There is no 'impenetrable barrier separating individuals from international law'.[2] The *Jurisdiction of the Courts of Danzig Case*[3] established that there is no reason why an international agreement cannot, as such, create direct rights and obligations for private individuals; the question is simply whether there was an intention in the particular case to create such rights. Individuals have a personal responsibility under international law for crimes against humanity,[4] war crimes,[5] piracy and analogous offences,[6] and offences against public ministers;[7] in matters of contract and tort, responsibility for the acts and omissions of persons acting on behalf of and as organs of the State rests upon the State as a juristic person,[8] but where *mens rea* is an element in liability it is proper that responsibility should rest with the human agency acting on behalf of the State,[9] and criminal responsibility in international law must be essentially individual, a proposition fully supported by the judgment of the Nuremberg Tribunal which 'treated the provision of the Charter laying down the individual responsibility of the accused for acts committed on behalf of the State as a self-evident rule of international law, as a matter both of principle and of the effectiveness of the law of nations'[10] and reaffirmed by the terms of the Genocide Convention.

The recognition of the individual as a subject of international rights and duties transforms profoundly the relationship of international law and international morality:

> 'Finally, the full and effective acceptance of the principle that individuals are subjects of international duties has a direct bearing on the evolution of international morality. The tendency to affirm and tolerate a double standard of morality in international relations—a tendency to assert that the individual acting as the organ of the State is not bound by the universal code of ethics which obtains in the relation of individuals—has in the past received nourishment from the notion that the obligations of international law do not rest upon the individual members of the State, but upon "the State". The unavoidable outcome must be the impairment of that moral factor which is the backbone of all law. It is not necessary to expatiate upon the consequences of the resulting position in relation to the effectiveness of international law. The two questions are interconnected.'[11]

[1] pp. 23–26.
[2] p. 28.
[3] *P.C.I.J.*, Series B, No. 15, pp. 17–21.
[4] pp. 35–38.
[5] pp. 38–39.
[6] p. 38.
[7] p. 39.
[8] pp. 40–42.
[9] p. 42.
[10] p. 44.
[11] pp. 46–47.

The existence of limitations upon the international procedural capacity of individuals does not invalidate the basic proposition that individuals must now be regarded as subjects of the law:

'Important as is the question of the procedural capacity of individuals before international tribunals, there is no reason to exaggerate its bearing on the problem of the subjects of international law. The two questions are not synonymous. The existence of a right and the power to assert it by judicial process are not identical. In the municipal sphere there are persons, such as minors and lunatics, who though endowed with rights are unable to assert them by their own action. If States were to declare solemnly and without equivocation, that they recognise certain inalienable rights of the individual —as they have done to some extent in the Charter of the United Nations—that declaration would amount to constituting individuals subjects of international law even if it were not accompanied by the concession to them of the faculty of independent action to enforce these rights. There is a clear distinction between procedural capacity and the quality of a subject of law.'[1]

But the existing limitations on procedural capacity are a survival from an earlier stage in the development of the law and the time has come for change. 'Nationality is no longer the only link between the individual and international law.'[1] The process of development may be a gradual one. 'While there are, at present, weighty objections to the recognition of the right of individuals to bring States before international tribunals independently of their consent, there would appear to be no decisive reason why individuals should not be able to exercise a right of this nature within the framework of such obligations of compulsory arbitral and judicial settlement as may be undertaken by States.'[2] One can conceive of Article 34 of the Statute of the International Court being amended to give the Court jurisdiction of 'disputes between States and private and public bodies or private individuals in cases in which States have consented, in advance or by special agreement, to appear as defendants before the Court'.[3]

The implications of these developments are fundamental. 'International law, which has excelled in punctilious insistence on the respect owed by one sovereign State to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State. . . . The consequent recognition of the individual human being as a subject of international law lends to the law obtaining between sovereign States the beneficent complexion of a law of nations conceived as the universal law of mankind.'[4]

There follows in Section II of Part I a similar discussion of the bearing of the law of nature on the rights of man. In Lauterpacht's view while the theory of natural law 'suffered an eclipse' in the nineteenth century which was 'dominated by the historical and analytical trends of jurisprudence',[5]

[1] p. 54. [2] p. 56. [3] p. 58.
[4] pp. 70–72. [5] p. 75.

it remains 'the continuous thread in the historical pattern of legal and political thought';[1] Greek philosophy, the Stoic philosophy, the political thought of the Middle Ages, the theory of the social contract, and the proclamation of fundamental rights in modern constitutions are all steps towards the concept that 'the rights of man cannot, in the long run, be effectively secured except by the twin operation of the latent forces of the law of nature and of the compelling force of the law of nations—both conceived as a power superior to the supreme power of the State'.[2]

The association of the law of nature and of the natural rights of man as an expression of the subordination of the ruler to the rule of law goes back to antiquity.

> 'In the nineteenth century that particular function of natural law was rendered both less urgent and less feasible for the reason that, apart from the defensive position in which the doctrines of natural law found themselves, that century was assimilating and putting into practice the accomplishments of the law of nature as expressed in the great American and French constitutional pronouncements. When in the twentieth century that achievement was put in jeopardy, the law of nature resumed, as we shall see, its historic function as the champion of the rights of man.'[3]

The renaissance of the law of nature in the twentieth century is 'the unmistakable result of the urge to find a spiritual counterpart to the growing power of the modern State'.[4]

There has been a similar relationship and interaction between the law of nations and the rights of man from Victoria onwards which is expressive of a deeper unity.

> 'Inasmuch as freedom means the fullest development of the possibilities of human personality it is not a means of the highest order, but an end in itself. The State is to ensure that freedom. The law of nations, conceived in the fullness of its proper function, exists for the double purpose of accomplishing that object by making man's freedom secure from the State and by rendering the State secure from external danger. It is not enough to say that the law of the State is circumscribed by its purpose and by the external nature of its power. Democracy, although an essential condition of freedom, is not an absolute safeguard of it. That safeguard must lie outside and above the State. . . . In that scheme of things the sovereign national State, whether or not it be the permanent form of the political organisation of man, is not an end unto itself but the trustee of the welfare and of the final purpose of man.'[5]

Lauterpacht concludes his discussion of the questions of general principle involved by posing the question how far the embodiment of the basic rights of the individual in a comprehensive fundamental enactment covering the totality of civil liberties is compatible with the British constitutional and legal tradition. His conclusion is that the absence of a written constitution and the doctrine of the absolute supremacy of Parliament should be

[1] p. 80. [2] p. 93. [3] p. 97. [4] p. 112. [5] pp. 123–4.

less decisive in the matter than such fundamental aspects of English constitutional doctrine as

'a powerful political tradition of freedom conceived, in the words of the Act of Settlement, as "the birthright of the English people"; the enunciation of the principle of natural rights of man by leaders of the Puritan revolution and by writers of the calibre of Milton, Locke, and Blackstone; and, above all, a succession of statutory charters of personal freedom which, any constitutional doctrine notwithstanding, acquired the character of fundamental laws of the kingdom and which enabled Blackstone to say that "the absolute rights of every Englishman" (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government'.[1]

In the light of this tradition 'it is not inconceivable that the supremacy of Parliament may be deliberately made to yield to an International Bill of Rights'.[2]

Part II of *International Law and Human Rights* is an examination of human rights under the Charter of the United Nations which discusses in turn the legal effect of the provisions of the Charter relating to human rights, the relevance and effect of the domestic jurisdiction clause, and the implementation of the Charter.

In Lauterpacht's view, the provisions of the Charter, while not embodying an explicit obligation to 'protect' human rights and 'studiously falling short of conferment of direct executive authority',[3] go beyond 'a mere declaration of principle devoid of any element of legal obligation',[3] and create legal rights of individuals and legal obligations of States and of the United Nations as a whole which were adopted 'as part of the philosophy of the new international system and as a most compelling lesson of the experience of the inadequacies and dangers of the old'.[3] The legal nature of the resulting rights and obligations is not 'decisively influenced by the fact that the Charter does not define the human rights and freedoms which the Members of the United Nations are bound to observe'[4] or by the fact that 'States when signing or adhering to the Charter clearly did not intend to assume an absolute, literal and immediate legal duty to give effect to the most comprehensive obligation to respect human rights and fundamental freedoms without discrimination as to race, sex, language or religion'.[5] The obligations of the Members of the United Nations 'probably include the duty to promote and to ensure the respect of human rights and fundamental freedoms not only in relation to legislative and administrative action by the authorities of the State conceived as an international person, but also, in certain cases, in relation to the local autonomous subdivisions

[1] pp. 139–40.

[2] p. 141; and cf. Jenks, 'The Proposed Peace Act', in *Transactions of the Grotius Society*, 21 (1938), pp. 1–21.

[3] p. 147. [4] p. 148. [5] p. 153.

of the State and even private bodies and individuals'.[1] There are 'persuasive reasons for asserting that the duty of a Member of the United Nations to protect the rights of man against acts other than those perpetrated directly by its own authorities follows from the obligations of the Charter of the United Nations in all cases in which the assistance of the State or of its resources is being sought or used for purposes inimical to those fundamental objects of the Charter'.[2] There is, moreover, 'room for the view that, because of the Charter of the United Nations, the State may be under a legal duty to prevent the denial of human rights through private action taken on such a scale as to assume the complexion of a public mischief'.[3] The question 'whether the provisions of the Charter of the United Nations impose upon its Members the implied obligation to protect human rights and fundamental freedoms against action from quarters other than the State authority directly accountable under international law' is 'of particular importance in relation to federal States'[3] since the provisions of the Charter 'are directly applicable in the realm of municipal law only to the extent to which they constitute legal obligations of the State'.[4] It is 'probably legitimate to assert that the duty of the State to promote the observance of and respect for human rights extends to the obligation to withhold the direct or indirect assistance of its law in support of the denial, from whomsoever emanating, of human rights and fundamental freedoms'.[5] The resulting duty of the State is paralleled by a similar duty of the international community. 'The provisions of the Charter on the subject impose legal obligations not only upon the Members of the United Nations. They imply a comprehensive legal obligation upon the United Nations as a whole.'[6] This obligation of the United Nations includes a 'clear duty of collective action'.[6] The outcome is to effect a far-reaching change in the position of the individual in international law:

'If these provisions of the Charter constitute legal rights and obligations, then they signify the recognition, in an international treaty of wide generality, of rights of the individual as such. They transfer the inalienable and natural rights of the individual from the venerable but controversial orbit of the law of nature to the province of positive law, of international law. They thus mark a significant step towards the recognition of the individual as a subject of the law of nations. They are not accompanied by the full conferment of international procedural capacity upon the individual to enable him to enforce, in his own right and in the judicial sphere, the legal benefits of the status thus acquired. But their silence on the subject does not imply a denial of any capacity whatsoever to vindicate his rights before international organs. On the contrary, such capacity will be determined not by any preconceived notions on the question whether the individual can under international law derive rights under treaties and enforce them in his own name, but by the degree to which the United Nations and its organs will assume the function of translating into reality the provisions of the Charter.

[1] pp. 154–5. [2] p. 155. [3] p. 157.
[4] p. 158. [5] pp. 158–9. [6] p. 159.

In proportion as they do that, the procedural capacity of the individual to petition the United Nations will be joined to his new status in international law. In turn, the full realisation of the significance of his new status, brought about by the recognition of his fundamental rights and freedoms, as a subject of international law, will enable him to assert them more effectively in the international sphere. In particular, there is henceforth no excuse for curtailing or keeping in check his right of effective petition by reliance upon the obsolete doctrine that he is not a subject of the law of nations.'[1]

The plea is as cogent as it was and remains timely. The only major question which can reasonably be raised in regard to its validity is whether the provisions of the Charter are comprehensive and unequivocal enough to support such far-reaching conclusions. They are very fairly summarized by Lauterpacht himself:

'The Preamble, in its first substantive passage, proclaims the reaffirmation of faith in fundamental human rights and the dignity and worth of the human person. The statement of the Purposes of the United Nations includes international co-operation in promoting and encouraging respect for human rights and fundamental freedoms.[2] The enumeration of the functions of the General Assembly comprises the initiation of studies and making of recommendations for the purpose "of assisting in the realisation" of these rights and freedoms.[3] The promotion of universal respect for, and observance of, human rights and freedoms figure in the statement of the objects of the Organisation in the field of economic and social co-operation[4] and of the system of trusteeship.[5] The Economic and Social Council is authorised to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms.[6] . . . There is a mandatory obligation implied in the provision of Article 55 that the United Nations "shall promote respect for, and observance of, human rights and fundamental freedoms"; or, in the terms of Article 13, that the Assembly shall make recommendations for the purpose of assisting in the realisation of human rights and freedoms. There is a distinct element of legal duty in the undertaking expressed in Article 56 in which "All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".'[7]

These provisions must be read together and their cumulative effect, it is submitted, fully supports the conclusions which Lauterpacht bases upon them.

What, however, of the provision of the Charter that nothing contained therein shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State?

Firstly, 'intervention is a technical term of, on the whole, unequivocal connotation' signifying 'dictatorial interference in the sense of action amounting to a denial of the independence of the State';[8] it 'implies a peremptory demand for positive conduct or abstention'; discussion, study and recommendation by the United Nations do not constitute intervention

[1] pp. 159–60. [2] Article 1, para. 3. [3] Article 13. [4] Article 55.
[5] Article 76. [6] Article 62. [7] pp. 146–8. [8] p. 167.

in this sense. 'None of these steps can be considered as amounting to intervention. None of them constitutes peremptory, dictatorial interference. None of them subjects to coercive action, or to a threat thereof, the unwilling determination of a State. They may mould its attitude, but this is a matter different from compulsion.'[1] Accordingly, 'a recommendation, even if specifically addressed to a State, not being in the nature of a binding decision the disregard of which may entail legal consequences, does not constitute intervention'.[2] Nor does an inquiry; 'neither would an enquiry amount to intervention, so long as it does not take place in the territory of the State concerned against its will'.[2]

Secondly, human rights are no longer, in view of the terms of the Charter, 'essentially within the domestic jurisdiction of any State'. In excluding matters which are essentially within the domestic jurisdiction of States, the authors of the Charter 'did not include within that exception matters which are the subject of international obligations (for these are not essentially within the domestic jurisdiction of States)'; these international obligations 'include the observance of and respect for human rights and freedoms—one of the fundamental principles of the Charter'; and 'as the practice of the United Nations has shown, a matter is no longer essentially within the domestic jurisdiction of a State if it has become a matter of international concern to the extent of becoming an actual or potential danger to the peace of the world'.[3] While the Charter contains no provision conferring authority upon any of the organs of the United Nations to decide the preliminary question whether a matter is essentially within domestic jurisdiction, it does not follow that it remains within the competence of each Member of the United Nations to decide, with an effect finally determining the legal position, whether a matter is within its domestic jurisdiction; 'the authority to decide upon disputed questions of interpretations of the Charter belongs, in principle, to the organ charged with its application'.[4]

From this reasoning Lauterpacht reaches the following conclusions:

'(*a*) Article 2, paragraph 7, while denying the right of intervention, does not exclude measures falling short of intervention as understood in international law;

'(*b*) Article 2, paragraph 7, while laying down that intervention is not authorised by the terms of the Charter, does not prevent Members of the United Nations from extending their obligations in this respect in any subsequent instruments to which they may choose to become parties;

'(*c*) matters essentially within the domestic jurisdiction of a State do not comprise questions which have become of international concern by virtue of constituting an actual or potential threat to international peace and security;

'(*d*) inasmuch as the question of the observance of fundamental human rights and freedoms is a basic legal obligation of the Members of the United Nations and,

[1] p. 169. [2] p. 171. [3] pp. 177–8. [4] p. 181.

particularly, inasmuch as it may become a matter of international concern in the sense indicated, it is outside the reservation of Article 2, paragraph 7;

'(*e*) in any case the terms of Article 2, paragraph 7, do not exclude, on the part of the organs of the United Nations, the procedures of investigation, study, report, and recommendation, seeing that these do not amount to intervention in the accepted legal connotation;

'(*f*) there may be room for a more rigid interpretation (subject to (*c*) above), in favour of the jurisdictional freedom of States, of the reservation of Article 2, paragraph 7, with regard to subjects such as the admission of aliens or regulation of tariffs, which, as a matter of history, have become closely associated with the conception of matters essentially within the domestic jurisdiction of States.'[1]

The erosion of domestic jurisdiction has now proceeded almost as far in respect of tariffs as in respect of human rights,[2] but with this qualification these conclusions are fully supported by subsequent practice and experience.

In discussing the implementation of the Charter Lauterpacht attaches special importance to the effective right of petition[3] and is critical of the failure of the Economic and Social Council and the Commission on Human Rights to develop an effective procedure for the examination of petitions on the basis of the provisions of the Charter.

'Nothing in the Charter [he contends] excludes either a general recommendation arising out of an individual complaint or a series of analogous complaints; or a specific recommendation addressed to a named State; or a request for information or comments on the subject of petitions received; or, with the consent of the State concerned, an investigation undertaken in its territory and with its co-operation; or, without the consent of the State in question, an investigation conducted outside its territory and not requiring its co-operation; or the initiation of a study, in fact indistinguishable from investigation, of the conditions underlying the complaint either in relation to the State concerned or to the general problem involved in the complaint; or the publication of the results of the investigation; or discussion of the specific and general aspects of the complaint.'[4]

The experience of the International Labour Organization in the particularly difficult field of freedom of association for trade union purposes[5] gives strong support to these contentions. In Lauterpacht's view the right of petition is a natural right which becomes progressively less important within the State as more effective procedures of redress develop but which represents as urgent and imperative a need at the present stage of development of international action as it was at the initial stage of development within the State:

'So long as, in the absence of an extension of the obligations of the Charter through an effective Bill of Rights or otherwise, the judicial or political remedies against the violation of its provisions remain in a rudimentary stage, the full right of petition, followed by investigation and recommendation, must be considered as inherent in the

[1] p. 214.
[2] Cf. Jenks, *The Common Law of Mankind* (1958), pp. 283–7.
[3] pp. 221–51.
[4] pp. 232–3.
[5] Cf. Jenks, *The International Protection of Trade Union Freedom* (1957).

Charter and as following imperatively from the obligation to interpret it in good faith.'[1]

Part III of the volume discusses the problem of an International Bill of the Rights of Man. The most permanently valuable part of this discussion is the analysis of general principles contained in Section I, which states the case for the inclusion in an international bill of rights of provisions relating to political, economic and social as well as personal rights,[2] pleads for a right of petition by aggrieved individuals as well as procedures of enforcement at the instance of Governments,[3] urges that an international judicial remedy should be available for violations of the bill or certain parts thereof,[4] and discusses possible sanctions for the bill. The sanction of expulsion from the United Nations is rightly rejected.

'It does not offer a remedy for particular violations, however serious and repulsive, of human rights. The penalty of expulsion will apply, as a rule, to cumulative violations of human rights on a large scale. But no true progress is likely in the effective protection of human rights until it becomes axiomatic that there must be a remedy for grave violations of the rights and the dignity of man, of the individual man—and not only for outrages *en masse*. Moreover, expulsion is not a remedy for a wrong; it is a sanction of dubious effectiveness which may perpetuate the wrong.'[5]

It follows that 'whatever may be the ordinary machinery for giving effect to the international guarantees of the Bill of Rights, that guarantee must, in the last resort, be of a political and coercive nature'.[6] In Lauterpacht's view it is more important that the bill should be effective than that it should be universal. An effective bill

'might become the turning-point in the history of the United Nations and of the world. It might not only provide a direct contribution to international peace which history has shown to be connected in intimate ways with the rights of man. It might also, by making the individual a subject of the international commonwealth, prove to be the decisive first step in the constitution of the Federation of the World which must, till accomplished, be regarded as the primary political goal of humanity.'[7]

There follows in Section 2 a draft of an International Bill of the Rights of Man which is offered as an alternative to the provisions of the Universal Declaration of Human Rights and of the United Nations Draft Covenants.[8] This draft has inevitably lost most of its potential practical interest as official action has developed, particularly since the entry into force of the European Convention on Human Rights and Fundamental Freedoms. The characteristic feature of the draft is that it substitutes for the enunciation of a series of rights of individuals a series of legal obligations binding upon States. As Lauterpacht himself puts it: 'The draft does not lay down that "everyone" "everywhere" has the right to inviolability of his person or to

[1] p. 251. [2] pp. 280–6. [3] pp. 286–91. [4] pp. 291–2.
[5] pp. 294–5; and cf. Jenks, 'Expulsion from the League of Nations,' in this *Year Book*, 16 (1935), pp. 155–7. [6] p. 295. [7] p. 310. [8] pp. 313–55.

freedom of religion. It imposes upon the State the legal duty to respect these rights.'[1] But surely this is a major political and psychological error. The inclusion in the bill of provisions which constitute unequivocally legal obligations binding upon States is, of course, essential, but failure to affirm the rights of the individual as such will tend to deprive the bill of much of its political pungency, moral dignity and emotional appeal, and there is no reason why the rights of the individual and the duties of the State should not be stated in equally unequivocal and comprehensive terms in the same instrument. The American Law Institute Statement of Essential Human Rights,[2] from which, historically, the Rooseveltian "everyone" "everywhere" terminology was largely derived, stated in each article a right of the individual and a corresponding duty of the State. The Universal Declaration of Human Rights, in view of its nature as a standard of achievement by which to measure national effort rather than a body of binding obligations, affirms the rights of the individual without attempting to define the corresponding duties of the State. In the European Convention for the Protection of Human Rights and Fundamental Freedoms the parties explicitly undertake to 'secure to everyone within their jurisdiction the rights and freedoms' defined therein.[3] The United Nations Draft Covenant on Civil and Political Rights contains a similar undertaking by each party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized' therein, 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[4] The United Nations Draft Covenant on Economic, Social and Cultural Rights contains an undertaking by the parties to take steps to achieve progressively the full realization of the rights recognized therein,[4] and most of the substantive articles are drafted in the form of a recognition of a particular right by the parties.[5] This is a fundamental criticism of the Lauterpacht draft. Other legitimate criticisms are that the clause qualifying 'the right of self-government in non-self-governing territories'[6] would not now be generally acceptable, that the provision of the draft relating to the rights of minorities[7] represents a European conception which may have a substantial application in Asia, the Middle East and Africa but is unlikely to be acceptable in the Americas, and that the clauses defining social and economic rights (which are very summary in character and speak, for instance, of 'public assistance' rather than 'social security')[8] are too conservative to win general acceptance. One of the characteristic features of the draft is a provision that 'within the limits of public security and the

[1] p. 323.
[2] *The Annals of the American Academy of Political and Social Science*, 243 (January 1946), pp. 18–26. [3] Article 1. [4] Article 2.
[5] E.g. Articles 6–16. [6] pp. 351–2. [7] pp. 352–4. [8] pp. 354–5.

economic capacity of the State, there shall be full and effective recognition of the right of asylum for political offenders and for fugitives from persecution';[1] Lauterpacht admits that 'of these limits the State must be the sole judge' and that 'to that extent the obligation would be imperfect', but contends that 'it would be a legal obligation to be executed in good faith'.[2] The possibility and desirability of securing acceptance of such an imperfect obligation clearly involves a personal judgment on matters which are primarily moral and political in character. The Lauterpacht draft also contains provisions that 'nothing in the Constitution of any Federal State shall relieve that State of the obligations of this Bill of Rights'[3] and that 'the obligations of this Bill of Rights shall be binding upon States in relation both to their metropolitan territory and to any other territory under their control and jurisdiction'.[4] Both of these suggestions appear to underestimate the importance of the political factors involved; the first presumes that the admittedly unique nature and importance of an international bill of rights will make it possible to overcome the difficulties which constitutional amendment so frequently involves in federal States;[5] the second ignores the direct conflict between the policy of progressive devolution of an ever-increasing measure of responsibility to the Governments and legislatures of colonial territories as an element in their constitutional progress and the automatic application of treaty obligations to such territories on the responsibility of the metropolitan Government.[6]

Section 3 of Part III consists primarily[7] of a severe criticism of the Universal Declaration of Human Rights. The essence of the criticism is that since the Declaration neither creates nor purports to create any legal obligation it was hypocritical of its authors to regard its adoption as an epoch-making event. Lauterpacht contends that:

> 'The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of the sacrifice of the sovereignty of States which it involves. Thus conceived, the fundamental issue in relation to the moral authority of the Declaration can be simply stated: That authority is a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own. The moral influence of ideas flows from the sincerity of those who proclaim them. Their sincerity is, in turn, evidenced by the degree of sacrifice which they are willing to bear on behalf of the ideas which they propagate. The Declaration does not purport to imply any sacrifice of the sovereignty of the State on the altar of the inalienable rights of man and, through them, of the peace of the world. Its moral force cannot rest on the fact of its universality—or practical universality—as soon as it is realised that it has proved acceptable to all for the reason that it imposes obligations upon none.'[8]

[1] Article 10, pp. 345–6. [2] p. 346. [3] Article 17, pp. 356–64. [4] Article 18, pp. 364–5.
[5] Cf. Jenks, *Human Rights and International Labour Standards* (1960), pp. 142–52.
[6] Cf. Jenks, *The Common Law of Mankind* (1958), pp. 246–7.
[7] pp. 394–434. [8] p. 419.

But this assumes that sovereignty in these matters must be surrendered by a gallant, decisive and final gesture and cannot be eroded by processes of growth whereby standards precede and crystallize into obligations and both are progressively made increasingly effective by gradual but relentless institutional developments. This is a pessimistic assumption, and happily is not warranted by experience.[1] It is a disservice to the development of more effective arrangements for the international protection of human rights to belittle the significance of the Universal Declaration of Human Rights as a stage in such a process of development. As Lauterpacht himself has said 'the moral claims of today are often the legal rights of tomorrow'.[2]

In his Hague lectures, Lauterpacht's criticism of the value of a Declaration of Human Rights was accompanied by an equally vigorous criticism of the suggestion that such a Declaration should be implemented progressively by a series of conventions on particular subjects. Such an approach, he wrote, 'would result in the unedifying spectacle of the fundamental and inalienable rights of man being made the object of separate treaties, signed by a limited number of States, subject to denunciation and other vicissitudes to which treaties are liable, and ratified, slowly and precariously, by an even smaller number—an undignified anticlimax to the solemn proclamation of human rights and to what ought to have been a decisive landmark in the history of freedom'.[3] The limitations of such an approach may be readily admitted, but this is a practical matter and not one of principle, and the only valid test is the practical results secured by the alternative approaches. Writing on the subject in 1947 Lauterpacht found the experience of the I.L.O. of dubious relevance and in any case discouraging; no one could reasonably take the same view in 1961 when a series of major conventions dealing with such matters as forced labour, freedom of association for trade union purposes, discrimination in respect of employment and occupation and equal pay for equal work have been adopted and, in the case of all but the most recent of them, already widely ratified by from 40 to 75 States;[4] a similar series of conventions dealing with such matters as freedom from arbitrary arrest and detention, fair trial and freedom from retroactive penalties, may play a significant part in future international action for the protection of human rights.[5] In the last months of his life Lauterpacht was contemplating a new edition of *International Law and Human Rights* and was giving serious consideration to modifying his view concerning the desirability of such a series of conventions on civil liberties.

[1] For a study of such a process in a particular field, see Jenks, *The International Protection of Trade Union Freedom* (1957).

[2] *International Law and Human Rights* (1950), p. 74.

[3] *Recueil des Cours*, 70 (1947—I), pp. 95–96.

[4] Cf. Jenks, *Human Rights and International Labour Standards* (1960).

[5] Ibid., pp. 139–42.

International Law and Human Rights closes on a more positive note by welcoming the prospect—which has since become a reality—of a European Convention on Human Rights and Fundamental Freedoms and a European Court of Human Rights[1] and drawing attention 'by way of general conclusion, to the intimate relation between the three central issues of international law and organisation: the idea of sovereignty, the notion of the *civitas maxima* conceived as a world federation of States, and the international recognition and protection of the rights of man'.[2] It is in 'the combination of self-government with the paramount necessity of order' that Lauterpacht finds the principal contribution of federalism.

'These, then, [he writes] are some of the aspects of the inter-relation between the three central issues of international law: the political integration of mankind in the direction of the Federation of the World, the curbing of the pretensions and aberrations of the doctrine of sovereignty, and the effective protection of human rights as part of the constitution of international society. The very idea of federation, inasmuch as it postulates a direct relation with the individual human being, receives a decisive accession of strength from the recognition, through effective institutions, of the rights of man. At the same time the notion and the experience of the federal system have acted as a powerful solvent of the doctrinal and political absoluteness of sovereignty. So have the ideas of the natural and inalienable rights of man which, when embodied in the safeguards and institutions of positive law—municipal and international—constitute a significant challenge to the unbridled sovereignty of the omnipotent State. In both senses—by their positive association with what is the essence of the federal system and by their negative effect on the mystic powers of sovereignty—the rights of man have played, and are increasingly bound to play, a significant part in the development towards a comprehensive Federation of the States of the earth.'[3]

However valid may be the criticisms to which the text of the Lauterpacht draft is open, and however questionable Lauterpacht's evaluation of some of the political factors involved may be—and these are questions which involve in a marked degree matters of personal taste and judgment—his analysis of the fundamental problems which the international protection of human rights poses for international law remains a major contribution to contemporary legal thought.

Oppenheim

Four editions of Oppenheim edited by Lauterpacht were published during his lifetime, the first being the fifth edition published in 1935–7 and the last the eighth edition published in 1955–7. A ninth edition was in an advanced stage of preparation at the time of his death. There was throughout an element of paradox in Lauterpacht's editorship which, through thirty years of unparalleled developments and changes in international law,

[1] pp. 435–56. [2] p. 456. [3] pp. 461–2.

maintained the standing of Oppenheim as the authoritative textbook of the English-speaking world. But intellectually Oppenheim and he had little in common except the range and thoroughness of their knowledge. Oppenheim was the last great master of the positivist school, and was in many respects a more confirmed positivist than Phillimore, Hall or Westlake had been; Lauterpacht was among the leading challengers of all the basic assumptions of that school. The result was a compromise satisfactory to no one. Oppenheim remained indispensable by reason of its thoroughness and the meticulous care with which new developments were incorporated in successive editions, but there was an increasing gap between the views of the author, who had frequently expressed himself with considerable dogmatism, and the equally strongly held and now far more widely acceptable convictions of the editor. These divergences related not to details but to fundamentals. 'We now know that the law of nature does not exist'; 'States only and exclusively are the subjects of international law'; these and many other broad affirmations of Oppenheim's positivist outlook had left their mark on the whole structure of his book and made it an increasingly inadequate vehicle for the expression of Lauterpacht's mature thought. Lauterpacht determined that in the ninth edition he would at last face the problem squarely, and his last months of active work were devoted to rewriting completely on the basis of his own views the whole of the first part of Oppenheim which he had previously felt it his duty to leave in the form of a statement of Oppenheim's views accompanied by comments and notes warning the reader that they were no longer generally held. An adequate assessment of Lauterpacht's editorship of Oppenheim must therefore await the appearance of the ninth edition. It is believed that the new general part of Oppenheim, which may be regarded as Lauterpacht's last testament, will be found to contain some of his most important work and may well outlive the treatise of which it is nominally a part.

In one respect Lauterpacht's editorship of Oppenheim was a tragedy; it deferred the preparation of a new general treatise on international law which can no longer come from his own pen. Almost thirty years must have elapsed since the present writer was first shown materials and notes designed to be used for the preparation of such a treatise; most of them were subsequently used for the preparation of successive editions of Oppenheim and for other purposes; the task was repeatedly postponed, partly because of the increasingly heavy pressure of other responsibilities, but primarily because Lauterpacht was reluctant to undertake it during a period when international law appeared to be upon the defensive. He would have liked it to be the completion of a life-work which had left its impact in a widening and deepening of the rule of law. In retrospect it was the one major task to which he had set his hand which his allotted span did

not enable him to carry to the point at which others can continue and complete his work. We may, however, take consolation in the fact that if we have today what is, despite its imperfections, a virtually contemporaneous comprehensive treatise on international law we owe it to his editorship of successive editions of Oppenheim. The range of Lauterpacht's miscellaneous writings was, moreover, so wide that when his collected papers are available in a convenient form they will be comparable to a treatise on many of the aspects of the law which have been of outstanding importance in recent times. Meanwhile his 1937 Hague lectures on *Règles générales du droit de la paix*,[1] which unhappily have been published only in French, continue, although now dated by the passage of almost a quarter of a century, to be a lucid and vigorous introductory survey of all that was most characteristic in his thought. They discuss most of the large questions of principle which remained a continuing preoccupation throughout his career: the place of international law in the legal order generally, the relations of international and municipal law, the sources of international law, the universality of international law, the subjects of international law, recognition, the law of treaties, the 'divisibility of sovereignty' in relation to territorial matters, the responsibility of States, justiciability and peaceful change.

Miscellaneous Writings

Lauterpacht's miscellaneous writings are both unusually voluminous and of exceptional range, depth and originality. They include innumerable articles for the *British Year Book of International Law*[2] and other periodicals, notably the *American Journal of International Law*,[3] the *Transactions of the*

[1] *Recueil des Cours*, 62 (1937—IV), pp. 99–419.

[2] E.g. 'Spinoza and International Law', 8 (1927), pp. 89–107; 'The Legal Remedy in Case of Excess of Jurisdiction', 9 (1928), pp. 117–20; 'Decisions of Municipal Courts as a Source of International Law', 10 (1929), pp. 65–95; 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals', 11 (1930), pp. 134–57; 'Dissenting Opinions of National Judges and the Revision of the Statute of the Court', ibid., pp. 182–6; 'The So-Called Anglo-American and Continental Schools of Thought in International Law', 12 (1931), pp. 31–62; 'Boycott in International Relations', 14 (1933), pp. 125–40; 'The Covenant as the "Higher Law" ', 17 (1936), pp. 54–65; 'The Law of Nations and the Punishment of War Crimes', 21 (1944), pp. 58–95; 'Implied Recognition', 21 (1944), pp. 123–50; '*De Facto* Recognition, Withdrawal of Recognition, and Conditional Recognition', 22 (1945), pp. 1–27; 'The Grotian Tradition in International Law', 23 (1946), pp. 1–53; 'The Universal Declaration of Human Rights', 25 (1948), pp. 354–81; 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 (1949), pp. 48–85; 'Sovereignty over Submarine Areas', 27 (1950), pp. 376–433; 'The Problem of Jurisdictional Immunities of Foreign States', 28 (1951), pp. 220–72; 'The Problem of the Revision of the Laws of War', 29 (1952), pp. 360–82; 'The Limits of the Operation of the Law of War', 30 (1953), pp. 206–43, 'Brierly's Contribution to International Law', 32 (1955–6), pp. 1–19.

[3] 'Revolutionary Activities by Private Persons against Foreign States', 22 (1928), pp. 105–30; ' "Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute', 28 (1934), pp. 43–60; 'Codification and Development of International Law', 49 (1955), pp. 16–43.

Grotius Society,[1] the *Law Quarterly Review*,[2] the *Cambridge Law Journal*,[3] the *Harvard Law Review*,[4] the *Yale Law Journal*,[5] the *Columbia Law Review*,[6] *Economica*,[7] *Politica*[8], the *Modern Law Review*,[9] the *Revue générale de droit international public*,[10] the *Political Quarterly*,[11] and Israeli[12] and Polish[13] publications; four series of lectures at The Hague Academy of International Law;[14] contributions to various symposia and *festschrift*[15] volumes; reports for the International Law Commission,[16] the Institute of International Law,[17] the International Law Association,[18] and the International Studies Conference;[19] and a number of official memoranda, including some of exceptional historical importance.

Some of these miscellaneous writings, in particular a whole series of

[1] 'Revolutionary Propaganda by Governments', 13 (1927), pp. 143–64; 'The Pact of Paris and the Budapest Articles of Interpretation', 20 (1934), pp. 178–206; 'Is International Law a Part of the Law of England?', 25 (1939), pp. 51–88; 'The Law of Nations, the Law of Nature and the Rights of Man', 29 (1943), pp. 1–34; 'Some Observations on the Problem of Reservations', 39 (1953), pp. 97–118.

[2] 'Contracts to Break a Contract', No. CCVIII (October 1936), pp. 494–529; 'The Subjects of the Law of Nations', 63 (October 1947), pp. 438–60, and 64 (January 1948), pp. 97–119.

[3] 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1947), pp. 330–48.

[4] 'Some Observations on Preparatory Work in the Interpretation of Treaties', No. 4, 48 (February 1935), pp. 549–91.

[5] 'Recognition of States in International Law', 53 (1944), pp. 385–458.

[6] 'Recognition of Governments', 45 (November 1945), pp. 815–64, and 46 (January 1946), pp. 37–68.

[7] 'Westlake and Present-day International Law' (November 1925), pp. 307–25; 'The Doctrine of Non-Justiciable Disputes in International Law' (December 1928), pp. 277–317; 'The British Reservations to the Optional Clause' (1930), pp. 137–72; 'The Nature of International Law and General Jurisprudence' (August 1932), pp. 301–20.

[8] 'Neutrality and Collective Security' (November 1936), pp. 133–55.

[9] 'Recognition of Insurgents as a *de facto* Government', Nos. 1, 3 (June 1939), pp. 1–20.

[10] 'Insurrection et piraterie' (September–October 1939), pp. 513–49.

[11] 'Japan and the Covenant', Nos. 2, 3 (April–June 1932), pp. 174–93; 'Resurrection of the League', 12 (1941), pp. 121–33.

[12] 'Nationality of Denationalised Persons', *Jewish Year Book of International Law* (1948), pp. 164–85.

[13] 'Sukcesja Państw w odniesieniu do zobowiązań prywatno-prawnych' in *Głos Prawa*, Nos. 5–6 (maj–czerwiec, 1928), pp. 1–18.

[14] 'La Théorie de differends non justiciables en droit international', *Recueil des Cours*, 34 (1930—IV), pp. 499–653; 'Les Travaux préparatoires et l'interprétation des traités', ibid. 48 (1934—II), pp. 713–819; 'Règles générales du droit de la paix', ibid. 62 (1937—IV), pp. 99–419; 'The International Protection of Human Rights', ibid. 70 (1947—I), pp. 5–107.

[15] E.g. 'Kelsen's Pure Science of Law' in *Modern Theories of Law* (1933); 'International Law after the Covenant' in *Problems of Peace* (10th series, 1936); 'The Problem of Non-Recognition' in *Legal Problems in the Far Eastern Conflict* (Institute of Pacific Relations Enquiry Series, 1941), pp. 129–56; 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (1958), pp. 196–221.

[16] 'First Report on the Law of Treaties', *Yearbook of the International Law Commission* (1953), vol. 2, pp. 90–166; 'Second Report on the Law of Treaties', ibid. (1954), vol. 2, pp. 123–39.

[17] 'De l'Interprétation des Traités, *Annuaire de l'Institut de Droit International*, 43 (1950), t. i, pp. 366–460, and ibid. 44 (1952), t. i, pp. 197–223.

[18] 'Human Rights, the Charter of the United Nations and the International Bill of the Rights of Man', International Law Assoc., *Report of the Forty-third Conference* (Brussels, 1948), pp. 74–138.

[19] 'The International Problem of Peaceful Change, the Legal and Procedural Aspects', International Institute of Intellectual Co-operation, International Studies Conference, Tenth Session, Paris, June 28–July 3, 1937, United Kingdom Memorandum No. 7.

articles and reports on justiciability, recognition, the subjects of international law and human rights, were subsequently absorbed in a modified or expanded form in his five major books and no longer call for discussion in their original form as a part of his miscellaneous writings; but when these have been deducted there still remains a body of work of a range and versatility which would have established the reputation of many a lesser man. It is neither possible nor necessary to review these miscellaneous writings exhaustively; it will suffice to indicate some of the salient features of the main groups into which they fall, distinguishing for this purpose his evaluations of the work of other writers, his discussions of successive crises in the attempt to establish an effective international order from 1931 to 1939, his contribution to the evolution of lend-lease and to the punishment of war crimes, his continuing interest in the law of war, his analyses of the prospects and problems of codification, his writings on the law of treaties, his part in the re-examination of the law of jurisdictional immunities, his papers on the relationship of international and municipal law, his unpublished suggestions on the future development of the work of the International Court, and 'Contracts to Break a Contract' (his solitary article on a question which was purely one of English law).

The Basis of Obligation in International Law

The keynote of much of Lauterpacht's work may be found in one of his less well-known articles, that on 'The Nature of International Law and General Jurisprudence' which appeared in *Economica* in September 1932.[1] This article contains his most valuable discussion of the basis of obligation in international law:

'The initial hypothesis in municipal law is that the will of the State must be obeyed; by way of a further explanation of this hypothesis it may be said that the will of the State consists of duly enacted statutes and custom as interpreted by courts. There is no reason why the original hypothesis in international law should not be that the will of the international community must be obeyed. By way of further explanation it could be said that, although in many cases the will of the international community must be deduced from the mere fact of its existence, i.e. from 'the reason of the thing', the organs of the formation of the will of the international community are, in default of an international legislature, States themselves, their consent being given by custom or treaty and being capable of impartial ascertainment and interpretation by international tribunals. An initial hypothesis expressed in the terms of *voluntas civitatis maximae est servanda* would point, as the source of law, to the will of the international society expressing itself in contractual agreements between its constituent members, in their

[1] I am indebted to Mr. Eli Lauterpacht for drawing my attention to this article of the existence of which I must confess to having been unaware when writing my article on 'The Will of the World Community as the Basis of Obligation in International Law' in *Hommage d'une Génération de Juristes au President Basdevant* (1960), pp. 280–99 which adopts a similar approach.

customs, and in the general principles of law which no civilised community can afford to ignore. . . .'[1]

The same article contains a decisive comment on the frequent invocation of the law of primitive communities as an explanation and at times a justification of the shortcomings of international law:

'The decisive factor is that modern States are *not* primitive communities and that there is a patent contradiction in any attempt to construe the relations between States of to-day as governed by the law of primitive peoples. Civilised States are *not* primitive tribes. Accordingly, lawyers who endeavour to explain by this method the perpetuation of the existing shortcomings of international law are engaged in a task which is as unscientific as it is unprogressive.[2] This reproach cannot effectively be met by the plea that there is nothing contradictory in the fact that States with a developed system of law within their borders are governed in the relations *inter se* by a deficient and almost illusory system of law. Only the current personification of the metaphysical State supported by the questionable doctrine of States as the sole subjects of international law enables writers to assert and justify the possibility of human beings—for States and governments are human beings—adopting fundamentally differing standards of order and justice in different spheres of action.'[3]

Evaluations of Grotius, Spinoza, Kelsen, Westlake and Brierly

Lauterpacht wrote a number of evaluations of the work of other writers which throw considerable light on his own outlook and processes of thought. These studies, written at intervals over a period of more than thirty years, discuss the Grotian tradition in international law,[4] Spinoza,[5] Kelsen,[6] Westlake[7] and Brierly.[8] We cannot but regret that he never attempted a similar evaluation of Oppenheim and that the appreciation of McNair which he had originally intended to undertake for McNair's seventieth birthday remained unwritten. In all of these studies, except perhaps that of Kelsen, Lauterpacht's approach is somewhat eclectic; they throw as significant a light upon the author as upon the subject; but while never failing to enlist, on behalf of the contemporary development of the law, the learning, the

[1] *Economica* (September 1932), p. 316.

[2] Professor Brierly (*The Law of Nations* (1928), p. 52), referring to the weakness of international law in regard to the imperfections of its law-creating machinery says—rightly, it is submitted—that such 'customary law can never be adequate to the needs of any but a most primitive society, and the international society of to-day is not, except in the matter of its law, at the primitive stage'.

[3] *Economica* (September 1932), p. 320.

[4] 'The Grotian Tradition in International Law', this *Year Book*, 23 (1946), pp. 1–53.

[5] 'Spinoza and International Law', this *Year Book*, 8 (1927), pp. 89–107.

[6] 'Kelsen's Pure Science of Law' in *Modern Theories of Law* (ed. W. Ivor Jennings, 1933), pp. 105–38.

[7] 'Westlake and Present-day International Law' in *Economica*, No. 14 (November 1925), pp. 307–25.

[8] 'Brierly's Contribution to International Law', reprinted in this *Year Book*, 32 (1955–6), pp. 1–19; Brierly, *The Basis of Obligation in International Law* (edited by Lauterpacht and Waldock, 1958), pp. xv–xxxvi.

vision and the moral stature of his predecessors, he has given us a series of evaluations of their work unequalled for scholarly circumspection.

Lauterpacht himself regarded his article on the Grotian tradition as perhaps the most important of all his occasional writings. Its mood is far from one of slavish adulation. He analyses, almost mercilessly, the 'somewhat exhibitionist learning', the defects of form and substance, and the perhaps excessive concessions to contemporary practice of the *De Jure Belli ac Pacis*, and fully recognizes the extraneous factors which 'had a share in securing its contemporaneous success and its place in the succeeding centuries', notably 'the timeliness of the treatise, its comprehensiveness as an exposition of international law, its wide jurisprudential background, and the already considerable reputation of its author'. He nevertheless found in it, and was justified in finding in it, a whole series of basic concepts in respect of which 'the teaching of Grotius has become identified with the progression of international law to a true system of law both in its legal and in its ethical content'. These concepts included

'the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of "reason of State"; the distinction between just and unjust war; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress.'

Of the general temper and climate of *De Jure Belli ac Pacis* Lauterpacht wrote:

'There is about it the atmosphere of strong conviction, of reforming zeal, of moral fervour. These qualities were typical of Grotius himself. . . . Grotius did not create international law. Law is not made by writers. What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code.'[1]

In discussing Spinoza, Lauterpacht was appraising a writer with the main features of whose doctrine of international relations he was in fundamental disagreement. He distinguished three such features, namely, 'the broad assertion that the mutual condition of States is that of the state of nature with all its implications', the special emphasis laid upon the absence of any obligation to observe treaties as one of the incidents of the state of nature, and 'the notion that the State in its dealings with its neighbours is not bound by the canons of morality and good faith observed either between the individuals who compose it, or between itself as the Government and its own subjects'.[2] In these concepts he found one of the influences

[1] 'The Grotian Tradition in International Law,' this *Year Book*, 23 (1946), pp. 1–53.
[2] 'Spinoza and International Law,' this *Year Book*, 8 (1927), pp. 92–93.

which, through Hegel and others, had contributed to perpetuating the absence of an effective law between States, and he lamented that a hesitating undercurrent in Spinoza's thought which might have led him to the concept of a community of nations under a reign of law failed to establish itself.

Kelsen was one of Lauterpacht's two acknowledged masters in the law. His appreciation of him was written nearly thirty years ago, before the appearance of any of Kelsen's more important writings on international law as distinguished from legal philosophy, and it appeared in a symposium of appreciations of legal philosophies; it therefore deals essentially with Kelsen as legal philosopher but, while discussing the 'initial hypothesis' and 'fundamental norm' of the 'pure theory of law', also evaluates the contribution of Kelsen as legal philosopher to international law. While accepting the principle of the primacy of international law and Kelsen's view of sovereignty, Lauterpacht does not follow Kelsen in rejecting natural law which he regards as 'a perennial source of legal justice' which has a continuing contribution to make to 'the cause of law' and 'the cause of justice'.

Lauterpacht's paper on *Westlake and Present-Day International Law*, written for the hundredth anniversary of Westlake's birth, was his first publication in English. In the case of Westlake, as in that of Grotius, he identified elements in Westlake's approach on which he thought it desirable to build for the future, in this case three in number. Westlake had espoused the view that 'international law deals with all human action not internal to a political body',[1] that while 'the society of states . . . is the most comprehensive form of society among men' it 'is among men that it exists', that 'states are its immediate, men its ultimate members', and that 'the duties and rights of states are only the duties and rights of men who compose it'.[2] In his discussion of the sources of international law Westlake rejected rigid positivism; he acknowledged two main sources, custom and reason, adding Roman law as a subsidiary source,[3] and in discussing the application of the inductive method in international law insisted that tendencies as well as external historical facts must be taken into account.[4] This view Lauterpacht emphatically endorsed:

> 'The definition of the sources of rules of international law as historical events is, I think, correct, but there is no reason to restrict these historical events to those only which are evidenced by acts of statesmen or written documents; the legal conviction and the sense of right of masses of men is a historical fact of no less force.'

Sovereignty Westlake conceived of as being for all practical purposes identical with independence, and by independence he meant lack of control

[1] *Collected Papers*, p. 412.
[2] p. 78.
[3] *International Law*, vol. 1, p. 14.
[4] *Collected Papers*, p. 410.

by other States, not independence of law, independence being essentially the freedom left by international law to the State. In this, Lauterpacht's first article, we find in germ all the essential features of his mature thought. We may say of him, as he said of Westlake, that it was his habit to discuss individual questions 'from the point of view of the *civitas maxima*' and that 'international law is to him the march towards the Great Design, the parliament of man, the federation of the world'.[1]

Lauterpacht found Brierly's 'most significant—and perhaps most lasting —contribution' to international law 'in the fact that during a period of transition and reassessment of values he threw the weight of his writing and teaching in the scales of what may properly be regarded as a progressive conception of international law'.[2] Brierly was a pioneer in emphasizing 'the beneficent potentialities of a revived law of nature as one of the main elements of the moral foundation of international law, in affirming the essential unity and identity of international and municipal law', and in rejecting 'the validity, in the international sphere, of the notion of sovereignty as the supreme will not subordinated to any overriding legal obligation'. There were respects, which Lauterpacht does not minimize, in which there were major divergences of view between Brierly and himself, notably as regards the relations of law and order, the outlook for judicial settlement, the scope of international law, the prospects of codification, the significance of peaceful change, the determination of aggression and the international protection of human rights. But underlying these divergences there was a sense of partnership in a common cause:

'. . . amidst his restraint, his apparent inconclusiveness, his disillusionment born of the experience of a period of unprecedented retrogression, and his disapproval of easy solutions, there asserted itself a fervent and constructive hope. While he was sceptical of radical schemes of world government, of constraint and of rigid legal obligations, he went beyond mere negation and mere questioning. The solution, he taught, lies in evolving an international order based on collaboration, on institutions, on consent, on international administration, on—he would have said if he had been less averse to pretentiousness of expression—functional international government.[3] To these he pinned his faith. "There is one solid ground for hope. . . . We have begun to see . . . that though the problem of world community remains essentially a moral problem, it is also in part a problem of statesmanship, and that international society needs institutions through which its members can learn to work together for common social ends."[4] It was a faith rooted in a fundamental optimism—even if that optimism was no more than an assumption. For he knew, from experience and otherwise, that the fate of institutions depends upon the persons to whom they are entrusted and that, in the sphere of action, ideas may not be more potent than the individual human beings called upon to realize them. He believed, perhaps, that the transcending power of these ideas is bound, in turn, to enhance the very stature of the persons into whose charge they have been committed. There may be a moral duty to cherish some such hope.'

[1] *Collected Papers*, p. 324.
[2] Ibid., p. 1.
[3] See, in particular, *The Law of Nations*, pp. 45, 46.
[4] Ibid., p. 45.

Together with these studies of international lawyers one should perhaps mention Lauterpacht's tribute to Lord Cecil,[1] written in 1941, on the occasion of the publication of Lord Cecil's autobiography,[2] a striking tribute to the 'enduring significance of the League of Nations', as interpreted by 'a realist statesman' who was inspired throughout by the conviction that 'the maintenance and the collective enforcement of international peace constitute a major national interest'.[3]

In his evaluations of Grotius, of Kelsen, of Westlake and Brierly—and by way of contrast, of Spinoza—we have a series of vivid pictures of what Lauterpacht regarded as one of the major personal obligations of the international lawyer towards international society—a moral earnestness which brooks neither denial nor delay.

Successive Crises of International Order, 1931–9

The same note of earnestness pervades his writing on the successive crises in the attempt to establish an effective international order during the period from 1931 to 1939. Lauterpacht felt keenly the disappointments and dangers of what he described consistently throughout its course as a period of regression. Despite successive disappointments he continued to write for the future, convinced that the turn of the tide must come, and that when it came it would be important that the full potentialities of the Covenant and the General Treaty for the Renunciation of War should have found vigorous champions throughout the period of stress. During the Manchurian and Ethiopian crises and the Spanish Civil War he wrote extensively on recognition; this part of his writings on the crises of the thirties was subsequently absorbed in *Recognition in International Law*; but he also wrote important articles on other legal issues of permanent importance posed by the crises of the thirties and these must be considered separately.

Manchuria

Of his Manchurian articles 'Japan and the Covenant' is perhaps the most memorable; it appeared in the *Political Quarterly* in April–June 1932[4] and argued, on grounds which have always appeared to the present writer to be unanswerable, that the Council of the League would have been fully entitled to treat its crucial resolution of 24 October 1931 as legally valid despite the negative vote of Japan, by regarding as applicable to action under Article 11 of the Covenant the principle that Members of the League were not under the Covenant judges in their own cause. The article

[1] 'Resurrection of the League', *Political Quarterly*, 12 (1941), pp. 121–33.
[2] *A Great Experiment* (1941).
[3] Loc. cit., p. 124.
[4] *Political Quarterly*, 3 (April–June 1932), No. 2, pp. 174–93.

also contained a characteristic protest against over-preoccupation with the problem of change:

'So much have minds been preoccupied with the necessity for changing the law that the abiding beneficence of its normal rule has been lost sight of.'[1]

Lauterpacht never departed from the position that the problem of change must not be seen out of focus, but he fully recognized that 'an effective machinery of peaceful change through overriding legislation is an essential part of a development from a rudimentary law obtaining between primitive communities to a true law as practised and organised by men in civilised society'.[2]

In 'Boycott in International Relations'[3] Lauterpacht questioned a suggestion by the Lytton Commission that, as a boycott of foreign goods might involve a question of international responsibility, the problem should be considered at an early date and regulated by international agreement. His view was that 'the international responsibility of the State is not involved if the boycott of the goods of a foreign country is pursued by the population by legal methods'. He placed the matter in the context of the broadest considerations of policy:

'In a world in which physical violence through wars proper has not become a matter of the past, there is an obvious element of exaggeration in the attempts to treat a peaceful form of struggle or resistance as war. Peace, in the sense of the absence of any form of competition, friction, or struggle, is a superficial idea—both within the state and outside it. International peace does not mean absence of international friction, or rivalries, or conflicting ambitions for the realization of men's will to power. It means that competition and conflicts of interests must find a solution by means other than war in its technical legal meaning. International peace does not mean that states will not behave in their mutual relations in a foolish, unfair, or immoral manner, or that such conduct will not be visited by retaliation of a similar nature. In a community from which war in its technical sense has been eliminated and which has not reached the stage of moral perfection, pacific means of pressure are unavoidable. To prohibit them would mean to court the more radical remedy of war. . . . It follows that, even if it were possible to impose upon states the duty to suppress peaceful boycott of foreign goods, such an innovation, even if feasible, would be open to objection on general grounds. This is not a case in which the separation of the duties of the state from those of the individuals composing it is necessarily productive of injustice.'

In a further article on ' "Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute'[4] Lauterpacht again elaborated the theme that the Covenant was a far better document than the inter-

[1] At p. 193.

[2] See his memorandum on *The International Problem of Peaceful Change: The Legal and Procedural Aspect*, International Institute of Intellectual Co-operation, International Studies Conference, Tenth Session, Paris, June 28–July 3, 1937, United Kingdom Memorandum No. 7, p. 59.

[3] This *Year Book*, 24 (1947), pp. 125–40.

[4] *American Journal of International Law*, 28 (1934), pp. 43–60.

pretation currently placed upon it, and endorsed the view that resort to armed force without an intention of resort to war on the part of the State having recourse to armed force might or might not be treated as a resort to war within the meaning of the Covenant at the option of the League.

The outcome of the Manchurian conflict, coupled with contemporaneous developments in Europe, coloured Lauterpacht's general outlook for many years thereafter and in some measure permanently. Lecturing in Geneva in August 1935 on 'International Law after the Covenant' he said, much to the discomfiture of Professor Manley O. Hudson who was in the chair:

'. . . international law, conceived as the expression of world order, has suffered a severe set-back in the period from 1920 to 1934. This estimate is subject to some qualifications, but the historian of the future will probably be right in saying that, not very long after the setting up of the Covenant, humanity recoiled—as if in astonishment at the implications of the change and in fatigue wrought by the material and mental devastation of the war—before the magnitude of the new departure, and was reverting to the essential characteristics of a system whose re-appearance many regarded in 1919 as inconceivable. The answer, in a word, will probably be that in the field of international law taken as a whole there was, in that period, no progress but retrogression.'[1]

From that point on, his sense of dedication, always strong, crystallized into the sense of mission which increasingly characterized his later work.

Ethiopia

The Ethiopian crisis prompted two further articles of continuing importance. In 'The Covenant as the "Higher Law" '[2] Lauterpacht endorsed the interpretation of Article 20 of the Covenant adopted by a legal subcommittee set up by the Co-ordinating Committee of the Assembly of the League in connexion with the application of sanctions. The effect of this interpretation was to establish 'the absolute primacy of the Covenant over any other treaty engagements of Members of the League *inter se* whether concluded prior or subsequent to the membership of the League, and, in some contingencies, over treaties concluded with non-Member states'. The article was 'not a knife blunted by the cutting of the dead wood of inconsistent treaties in force when states enter the League' but a 'perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members, whenever concluded'. Lauterpacht was nevertheless unwilling to base this result on 'any hierarchical superiority about the Covenant as a legislative instrument'. He founded it primarily on the general principle that 'treaties, other than those between the same contracting parties, which conflict with the provisions of previous treaties so

[1] *Problems of Peace, Tenth Series, Anarchy or World Order* (1936), pp. 37–56, at p. 37.
[2] This *Year Book*, 17 (1936), pp. 54–65.

as to cause injury to the interests of some of their signatories, are, to the extent of such incompatibility, invalid and unenforceable before international courts'. The theme coincides with that which he was to develop almost simultaneously with reference to English law in 'Contracts to Break a Contract'.[1] He conceded, however, that 'Article 20 brings into relief the fact that while the Covenant of the League is no more "law-making" than any other treaty, the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of political integration of mankind as to deserve the designation of a "higher law" '. This was the furthest that he was prepared to go in the direction of recognizing the special nature and characteristics of law-making treaties; there will be many to regret that he continued to adhere to the view which he had expressed on this point in *Private Law Sources and Analogies of International Law*[2] and that he did not feel able to modify it more substantially in the light of the subsequent work of McNair and Hudson.

'Neutrality and Collective Security'[3] is a broader study, written late in 1936 when collective security stood 'discredited amidst the universal opprobrium of disloyalty and the humiliation of failure'. On the main points of law at issue Lauterpacht's conclusions were that the Covenant had not wholly abolished the doctrine or law of neutrality, that the latter had been left intact in those cases in which recourse to war did not amount to a violation of the Covenant or was 'not so regarded by third Members of the League in the exercise of their sovereign discretion', and that in cases in which there had been such a violation of the Covenant the non-belligerents were entitled to remain neutral but that the law of neutrality conceived as an attitude of impartiality between the belligerents no longer applied; we have here a significant anticipation of his reasoning concerning neutral rights and obligations in 1940. He also discussed the broader issues. He recognized the possible advantages of qualified neutrality in a system of collective repression of war:

> 'Its principal asset is that it admits of gradation and elasticity; it allows adjustment of the measures of assistance and pressure to the degrees of responsibility and to the exigencies of the moment; it renders it unnecessary to put into motion a gigantic weapon in order to remove what may be an insignificant cause; it avoids converting a system of collective repression of war into an instrument producing a general conflagration in the extreme form of war.'[4]

But he was fully conscious of the dangers of progressive disintegration and demoralization and insisted that, fundamentally, 'collective security and neutrality are inherently antagonistic and antinomous'. Whenever the

[1] p. 98, below.
[2] pp. 5–6 above.
[3] *Politica*, 2 (1936), pp. 133–55.
[4] p. 148.

aggressor enjoyed military preponderance he would 'achieve his object in a war of short duration followed by the annihilation and annexation of the attacked state' and 'what in such cases will be left of collective security is the doubtful operation of the doctrine of non-recognition, which is no more than the ineffective apology of a guilty conscience'.[1]

Lend–lease

The most important of Lauterpacht's unpublished papers is a memorandum of 15 January 1941 on the 'Principles of International Law Governing the Question of Aid to the Allies by the United States'.

While Lauterpacht had originally been critical of over-confident reliance on interpretations of the General Treaty for the Renunciation of War which might prove to be of uncertain value in time of stress,[2] he never failed to insist on the fundamental nature of the change wrought by the Treaty in the law. His 1941 memorandum is perhaps the completest, and certainly the historically most important, expression of his view.

The memorandum places the contemporary problem in historical perspective:

'The basic juridical principle of the policy of "all aid short of war" combined with the preservation of neutral status is the fact that international law knows of no such thing as neutrality conceived as a rigid and immutable standard of impartiality and non-participation. In international law neutrality is an ever-changing concept. In particular, its character and substance are determined by the legal admissibility of war in any given period. Neutrality in the 17th and 18th centuries was a body of doctrine and practice different from neutrality in the 19th century, and in the first two decades of the 20th century. In turn, as between the members of the League of Nations, neutrality in the period which began in 1919 was unlike that in the preceding century. Again, as between the States bound by the General Treaty for the Renunciation of War—the so-called Kellogg–Briand Pact—neutrality assumed an entirely novel complexion. . . . For neutrality is not an independent part of international law. It is ancillary to the institution of war. It has a place in international law only in so far and to the extent to which war is part of it. In an international law in which the right of war is unlimited, neutrality is a status as logical as it is exacting. In the international law of the 19th century war was permitted not only as a means of enforcing rights but as an instrument for openly challenging and defying the existing law. War was never an illegality. There was never an unjust war. Every war was just. In that scheme of things there followed, as the necessary logical result, the duty of impartiality and non-participation. There was, in law, no room for discrimination against one belligerent when, in law, no impropriety attached to the action of either.

'The case is different when the law denies or circumscribes the right of war. This was the position in the 17th and 18th centuries. The doctrine of international law at that time was based on the distinction between just and unjust wars. From that distinction there was logically derived the legal duty of members of the international

[1] p. 149.

[2] See his paper on 'The Pact of Paris and the Budapest Articles of Interpretation' in *Transactions of the Grotius Society*, 20 (1934), pp. 178–206.

society, bound by the ties of solidarity of Christian civilisation, to discriminate against a State engaged in an unjust war—in a war undertaken without a cause recognised by international law. That duty was stressed by the scholastic writers in the formative period of the law of nations. It was voiced by Grotius, the father of modern international law. There was, in his view, no duty of impartial treatment when one of the belligerents had resorted to war in violation of international law. Writing in 1625, he said: "It is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." More than a century later Vattel, the leading international publicist of the age, expressed a similar view: "It is lawful and praiseworthy to assist in every way a nation which is carrying on a just war: and such assistance even becomes the duty of every nation which can give it without injury to itself." The fact is that neutrality as an attitude of absolute impartiality is not derived from any essential principle of international law, and that it never has struck such deep roots in the law of nations as to remain unchallenged either in theory or in practice.'

It is against this historical background that the effect of the General Treaty for the Renunciation of War must be considered:

'That treaty deprived its signatories of the right of war as an instrument of national policy. The effect of the treaty was to render unlawful wars undertaken in violation of its provisions. In consequence, the treaty destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality. It did not impose upon the signatories the duty of qualified neutrality discriminating against an aggressor, but it conferred upon them *the right* to act in that matter. This right they are indisputably entitled to exercise as guardians both of their own interests and of the wider international good. It follows that for the State which has gone to war in violation of its obligations a war thus undertaken confers no irrevocable or mutual rights against States which choose to preserve their neutral status. It derives no rights from its illegality. For reasons of humanity and convenience the rules of warfare may continue to operate as between the belligerents, and the better opinion is probably that they should be allowed so to function. These considerations do not apply to the relations between the neutrals and the State guilty of a violation of the General Treaty for the Renunciation of War.'

A right of discrimination in the matter of neutrality could also, in the circumstances of the time, be supported by a right of reprisals against violators of the General Treaty for the Renunciation of War or based on the broad jurisprudential basis of self-defence.

It will be for historians to estimate at a proper time the effect which these views may have had at a critical juncture, but a comparison between them and the address subsequently delivered by Attorney-General Jackson before the Inter-American Bar Association of Havana, Cuba, on 27 March 1941[1] will be found to be not without interest.

War Crimes

As the war moved towards a successful conclusion Lauterpacht, strongly stirred by the plight of his co-religionists in Nazi-controlled Europe,

[1] *American Journal of International Law*, 35 (1941), pp. 348–59.

became increasingly preoccupied with the problem of the punishment of war crimes. His views on the whole subject are set forth in full in an article published in the *British Year Book* for 1944.[1] Lauterpacht was associated with the negotiations which resulted in the establishment of the International Military Tribune and both Mr. Justice Jackson and Sir Hartley Shawcross (as he then was) paid generous tribute to his services at Nuremberg in the preparation of the cases against the major war criminals; he took a profound and permanent satisfaction in the part which he had played in bringing to justice those responsible for offences against the peace, offences against the laws of war and offences against humanity which were a flagrant affront to his most deeply held convictions. There was no trace in his approach of a spirit of vengeance, but rather a deep conviction that only by exacting the full penalty of the law could the past be purged and the future made secure.

The Laws of War

While foremost among the champions of the view that the Covenant of the League of Nations and the General Treaty for the Renunciation of War had involved fundamental changes in the law of neutrality, Lauterpacht was never among those who belittled the continuing importance of the laws of war. His editorial responsibilities in connexion with Oppenheim, the *British Year Book*, and the *Annual Digest—International Law Reports* made it essential for him to keep fully abreast of current developments in the law of war and he never failed to do so. He made an important contribution to the preparatory work of the 1949 Geneva Conference on the Relief of the Wounded, Sick and Shipwrecked, the Treatment of Prisoners and the Protection of Civilians in Time of War; he wrote two major and influential articles on the subject; and he revised thoroughly on behalf of the War Office Part III of the United Kingdom *Manual of Military Law*, which deals with the laws and usages of war on land. His last intervention in the discussions of the Institute of International Law was a plea for continuing attention to the law of war.[2]

Lauterpacht defined his general approach to the whole subject in 'The Problem of the Revision of the Law of War':[3]

> 'We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.[4] Rules of Warfare are not primarily rules governing the

[1] 'The Law of the Nations and the Punishment of War Crimes', this *Year Book*, 21 (1944), pp. 58–95. [2] *Annuaire de l'Institut de Droit International*, 48 (1959), t. ii, pp. 186–7.

[3] This *Year Book*, 29 (1952), pp. 360–82.

[4] The Preamble to The Hague Convention of 1907 respecting the Laws and Customs of War

technicalities and artifices of a game. They have evolved or have been expressly enacted for the protection of actual or potential victims of war.'[1]

He did not regard either aerial bombardment or the use of atomic weapons as necessarily illegal under the existing law, but held that 'there are at least three spheres, of limited compass, in which tasks both urgent and practicable claim the attention of the lawyer', namely, further legal regulation of the humanitarian fringe of the problems involved in the use of new weapons of war, sustained exposition and clarification of the far-reaching provisions of the 1949 Geneva Conventions, and the further clarification of matters not covered by the Geneva Conventions, including the implications of the principle that the law of war is binding not only upon States but also upon individuals. He conceded, however, that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law' and that the international lawyer must therefore do his duty in these matters 'with determination though without complacency and perhaps not always very hopefully'.[2]

In 'The Limits of the Operation of the Law of War'[3] Lauterpacht discussed how far the rules of war are applicable to a war of aggression undertaken by one belligerent side in violation of a basic international obligation prohibiting recourse to war as an instrument of national policy. His analysis led him to four main conclusions: (1) that the principle that a State which has embarked upon war in violation of a basic prohibition of international law cannot invoke for its benefit the rules of warfare does not apply, *durante bello*, to the actual conduct of hostilities and, generally, to the mutual relations of belligerents; (2) that neither judicial authority nor, to any substantial extent, the practice of Governments support the proposition that a State waging an unlawful war does not obtain or validly transmit title with respect to property acquired in connexion with the conduct of war and in accordance with international law; (3) that a State waging an unlawful war is not entitled, after the war, to invoke rules of customary international law which disregard the vitiating effect of duress in the conclusion of treaties, which recognize title by conquest, which absolve the belligerent from reparation for damage caused by lawful acts of warfare

on Land refers, in the first place, to the desire of the contracting parties to serve, even in the extreme case of war, 'the interests of humanity and the every progressive needs of civilization'. In the same Preamble it is stated that in matters not expressly provided for by the Convention the inhabitants and belligerents remain under the protection of the principles of international law 'as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience'.

[1] This *Year Book*, 29 (1952), pp. 363–4.

[2] Ibid., at pp. 381–2.

[3] Ibid., 30 (1953), pp. 206–43; this article was an expansion and substantial revision of 'Rules of Warfare in an Unlawful War' published in *Law and Politics in the World Community* (1953), a collection of essays in honour of Hans Kelsen.

which give it the right to regard as dissolved treaties concluded prior to the outbreak of war, and which render it—and the individuals responsible for its actions—immune from criminal responsibility for the initiation of a war of aggression; and (4) that it is open to and in special cases incumbent upon neutral States, especially if bound by the obligations of a system of collective security, to discriminate against a State which has been authoritatively declared to be guilty of aggression. Lauterpacht conceded that these conclusions were 'both inconclusive and unsatisfactory from the point of view of wider principle' and gave 'little cause for satisfaction', but he held that 'banished as a legal institution, war now remains an event calling for legal regulation for the sake of humanity and the dignity of man' and that 'legal regulation is also required to safeguard the possibility of some measure of voluntary collaboration between the belligerents after the war'. He developed the argument with great cogency:

> 'There is no room for clear-cut solutions in a situation analogous to a revolution within the State. For in a system of international law in which war is prohibited, recourse to war is in the nature of a revolution against the basic law of the international community. The fact of revolution and of action aiming at its suppression calls for some temporary relaxation of the apparent inexorabilities of the law. While the contest is in progress juridical logic must not be allowed to add to the cruelties and sufferings of battle; nor must it be permitted to result in the dissolution of all bounds of legal restraint. As soon as, in terms of practical relevance and urgency as distinguished from mere doctrinal interest, the problem arises as to the applicability of rules of war in what is termed international police action, there is in fact no longer any question of police action in the ordinary sense. The situation is one of a contest prolonged in duration and possibly precarious in its progress and outcome—and these are the characteristics and concomitants of war. The resulting situation is a clear indication of the fact that organized international society has failed not only to prevent hostilities but also to ensure that swift and overwhelming suppression of the insurrection against the international order which alone can qualify it as police action in the ordinary sense of that term. It must be a matter for reflection whether to that calamity there ought to be added that of the total abandonment of the restraints of the law of war. For such is likely to be the result of the claim on the part of one belligerent side to be entitled to jettison some of them and to retain others at his option.'

The practical outcome of this reasoning must command general approval, but would it not be preferable to state the principle on which it is based somewhat differently and to say that the laws of war are binding on all participants in hostilities not because of any presumed equality of right between the belligerents irrespective of the legality or illegality of their recourse to force, but because any recourse to force, whether legal or illegal, remains subject to the restrictions of the laws of war on overriding grounds of policy and humanity? By resting the applicability of the law of war in this manner on such overriding grounds of policy and humanity we can in at least some measure eliminate the 'dualism of considerations'

which Lauterpacht found so 'baffling and confusing'. A violation of the laws of war by a State acting in self-defence or in discharge of international covenants is a violation of the principle that measures of self-defence must be proportionate to the imminence and seriousness of the prospective danger—a principle which is common to all the major legal systems and which it is vital to maintain if self-defence and the enforcement of international covenants are not to degenerate into forms of retaliation little less dangerous to the international community than aggression itself. A violation of the laws of war by a State which has had recourse to force in violation of its international obligations is an aggravation of its original breach of the law. In both cases there is a breach of the law but it is not the same breach of the law. Such a construction reconciles the obligation not to resort to force and the important difference recognized by the modern law between legal and illegal resort to force with the need to ensure that any recourse to force, whether legal or illegal, remains subject to the restrictions of the laws of war on overriding grounds of policy and humanity.

The United Kingdom *Manual of the Law of War on Land* was originally prepared, on the basis of the *Manual on the Laws and Customs of War on Land* prepared by Holland in 1903,[1] by Colonel J. E. Edmonds and Oppenheim in 1914, and was revised in 1936; it was revised again by Lauterpacht, shortly before his election as one of the judges of the International Court, with the co-operation of Lt.-Col. G. I. A. D. Draper of the War Office, but the revised version was not published until 1958. The *Manual* as revised by Lauterpacht takes account of the work of the various tribunals which adjudicated upon war crimes after the Second World War, incorporates the provisions of the Geneva Conventions of 1949 and draws heavily upon the material relating to the law of war incorporated by Lauterpacht in successive editions of Oppenheim. On a number of major issues it gives characteristic expression to Lauterpacht's own views, which must now be regarded as having been endorsed by the United Kingdom War Office. The *Manual* begins with a clear and far-reaching statement of principle:

'The laws of war are the rules which govern the conduct of war—rules with which, according to international law, belligerents and neutrals are bound to comply. They are binding not only upon States as such but also upon their nationals and, in particular, upon the individual members of their armed forces.'[2]

The defence of superior orders is categorically rejected:

'Obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment.'[3]

[1] Holland subsequently published in 1908 his well-known *The Laws of War on Land (Written and Unwritten)*. [2] Para. 1, p. 1. [3] Para. 627, p. 176.

This passage, about which there has been some disagreement with the United States,[1] diverges from the view expressed in the sixth and seventh editions of Oppenheim and it is not clear how far Lauterpacht subscribed to it. There is no similar doubt concerning the equally categorical rejection of the alleged immunity of Heads of States and ministers:

'Heads of States and their ministers enjoy no immunity from prosecution and punishment for war crimes. Their liability is governed by the same principles as those governing the responsibility of State officials except that the defence of superior orders is never open to Heads of States and is rarely open to ministers.'[2]

Nor is military necessity a valid plea:

'Unless in any convention or customary rule express allowance is made for military necessity, officers and other members of the armed forces are not entitled to violate specific prohibitions of the law of war on the plea of military necessity.'[3]

These firm positions on major questions of principle are fully supported by authority and in particular by references to the decisions of the International Military Tribunal at Nuremberg and other war-crimes tribunals.

Lauterpacht also took the initiative in arranging for a series of meetings held at Cambridge between the United Kingdom and United States Government lawyers concerned with the preparation of Part III of the United Kingdom *Manual of Military Law* and the United States Field Manual, *The Law of Land Warfare*, with a view to securing the largest possible measure of agreement in the content and formulation of the relevant legal rules.[4]

The Codification of International Law

Lauterpacht wrote two general surveys of the prospects and problems of codification. The first, the *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, prepared as a point of departure for the work of the Commission at the request of the Secretary-General of the United Nations, was published in 1949 as a document submitted to the Commission by the Secretary-General, but Lauterpacht's authorship of it, always apparent from internal evidence and already widely known, was publicly acknowledged by the Secretary-General's representative when the Commission paid tribute to Lauterpacht at the time of his death. The second, which was written immediately

[1] United States Field Manual 27–10, *The Law of Land Warfare* (1956), p. 181, para. 509.

[2] Para. 632, p. 179.

[3] Para. 633, p. 179. There is an interesting contrast of emphasis with Holland's formulation of this principle in 1908: 'Military necessity justifies a resort to all measures which are indispensable for securing this object, provided that they are not inconsistent with the modern laws and usages of warfare', *The Law of War on Land* (1908), para. 2, pp. 12–13.

[4] See Baxter, 'The Cambridge Conference on the Revision of the Law of War', in *American Journal of International Law*, 47 (1953), p. 702.

prior to his election as a member of the International Court and appeared in the *American Journal of International Law* in 1955, reflects[1] his experience as a member of the Commission.

The *Survey* poses the question of what is meant by the codification of international law and gives three basic reasons for which the concept of codification cannot 'be confined to those branches of international law with regard to which there exists a full and clear agreement as ascertained by a uniform governmental practice, judicial precedent and doctrine'. In the first instance, 'there are only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification'. Secondly, codification conceived as a mere registration in a systematized form of the existing law 'may crystallize the law in matters in which the existing rules are obsolete and unsatisfactory'. Thirdly, such codification 'would be interpreted as a replacement of customary international law by what is in effect a treaty' and 'would expose what has hitherto enjoyed the unchallenged and secure authority of a customary rule to the uncertainties and vicissitudes of treaties in all phases of their creation and operation'. In these circumstances 'the standard of selection of topics for codification cannot be found by reference to any single test such as the degree of agreement or disagreement on the subject or the urgency of its formulation'; the question is one of 'fitting the work of the Commission at any particular time into the orbit of a comprehensive plan' and the selection is therefore something to be determined 'by considerations of convenience, of available means and personnel, of classification and of scientific symmetry'. Nor can there be any uniformity in the manner in which the Commission deals with different topics; concluded conventions, drafts which have not ripened into conventions, and statements and restatements not designed for immediate incorporation in conventions may all play a useful part. The *Survey* discusses in this general spirit 'the whole field of international law' and mentions among the matters which might be included in a comprehensive programme of codification the subjects of international law, the sources of international law, the obligation of international law in relation to the law of the State, the fundamental rights and duties of States, the recognition of States and Governments, the recognition of acts of foreign States, jurisdiction over foreign States, the obligation of the State to prevent its territory from causing economic injury to neighbouring territory, jurisdiction with respect to crimes committed outside national territory, the territorial domain of States, the régime of the high seas and of territorial

[1] 'Codification and Development of International Law', *American Journal of International Law*, 49 (January 1955), pp. 16–43.

waters, nationality, the treatment of aliens, extradition, the right of asylum, treaties (with special reference to their conclusion, interpretation and discharge), diplomatic and consular intercourse and immunities, state responsibility and arbitral procedure. In respect of each of these matters it discusses previous efforts at codification, the grounds on which codification is desirable and the extent to which it is likely to be practicable. In the absence of any intrinsic priority among these matters the *Survey* suggested that the selection of topics should be made by reference to a comprehensive long-range plan of codifying international law as a whole over a period which might cover a generation, that the topics selected should be broad fields of study rather than limited and isolated branches of the law, and that the drafts prepared should not be so general in character as to fail to remove uncertainties or conceal continued disagreement. While the primary task of the Commission is to state what the law is and to indicate the extent of existing disagreement and divergences, 'much of the product of its work may follow the lines of some of the past great achievements of codification in the municipal sphere' and 'not only be acts of international law finding, but also, if necessary, acts of international legislation and of international statesmanship'. The *Survey* contemplated that the main part of the preparatory work would be entrusted by the Commission to *rapporteurs* and this has become the accepted system, but it also envisaged a degree of consultation of bodies like the Institute of International Law and other scientific bodies for which no effective provision has been made.

Lauterpacht's article on the 'Codification and Development of International Law' was written five years later in the light of the experience which had then been acquired by the Commission and of his own participation in its work. It expresses a chastened but by no means a despondent mood. He starts from the difficulty that 'once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle—even though this may be an overestimate in some cases—there is no semblance of agreement in relation to specific rules and problems'. He illustrates the difficulty by examples covering virtually the entirety of the law of treaties and points out that upon reflection there is nothing astonishing in the position. 'How could it be otherwise in a society in which judicial settlement is sporadic, in which there is no legislative activity in the accepted sense and in which custom is slow of growth and controversial in interpretation and application?' In these circumstances the call for codification is 'not the product of legal perfectionism' but 'an imperative need of international society', a need made more urgent by both the extent to which the uncertainty of the law makes governments reluctant to accept the compulsory jurisdiction of

international tribunals and the fact that, as the *Genocide* and *Anglo-Norwegian Fisheries* cases have shown, 'on occasions decisions of international tribunals themselves, far from supplying the missing element of completeness, may infuse an element of doubt and uncertainty where hitherto there existed relative clarity and agreement'. His general conclusion was that 'universal acceptance of the results of codification can be achieved in the international sphere only at the expense of making it nominal and retrogressive', particularly 'in periods when political divisions in the world and the conflict of some fundamental notions of law as between groups of States render impracticable, in most matters, any attempt to achieve generally agreed statement or development of the law', and that in these circumstances 'the universal character of codification cannot mean more than that all States should be given an equal opportunity of participating in the work of codification and of associating themselves with its results'. While regarding the restatement of the law by private scientific effort as invaluable, he nevertheless adhered to the view that 'the work of codification, if it is to achieve its primary purpose, must take place under the auspices of governments, acting, if possible, through and within the United Nations'. The codifying agency must be an independent body, but 'the task of codification is impossible of achievement unless aided by the co-operation on the part of governments at every stage'. While extending to 'several generations' the period of 'two decades or so' within which the *Survey* had contemplated that the task might be completed, Lauterpacht remained persuaded of the critical urgency of codification and concluded with a plea 'that organs entrusted with the task of codification be endowed with a constitution and resources commensurate with its place in the scheme of the Charter'.

The Law of Treaties

While Lauterpacht played a leading part in the discussion of all the topics considered by the International Law Commission during the period of his membership of it, his most distinctive personal contribution to its work was the submission of two reports on the law of treaties.[1] These followed three earlier reports by Brierly[2] and were themselves followed by a series of five reports by Fitzmaurice.[3] No firm conclusions on the subject were reached by the Commission while Lauterpacht remained a member; the reports must therefore be judged by their intrinsic interest and importance rather than by any practical results achieved on the basis of them and

[1] *Yearbook of the International Law Commission* (1953), vol. 2, pp. 90–166; ibid. (1954), vol. 2, pp. 123–39.

[2] Ibid. (1950), vol. 2, pp. 222–48; ibid. (1951), vol. 2, pp. 70–74; ibid. (1952), vol. 2, pp. 50–56.

[3] Ibid. (1956), vol. 2, pp. 104–28; ibid. (1957), vol. 2, pp. 16–70; ibid. (1958), vol. 2, pp. 20–46; ibid. (1959), vol. 2, pp. 37–81; ibid. (1960), vol. 2.

Lauterpacht himself did not hesitate to make it clear that he was well content that they should be judged by such a test. It may be said without uncharitableness of Brierly's reports for the Commission that they were in the nature of general outlines. This appears indeed to have been Brierly's set policy; he appears to have hoped to secure practical results more readily by circumscribing the area of controversy and decision. Lauterpacht conceived of the task entrusted to him in a different way and on an altogether different scale. His *First Report*[1] dealt comprehensively with the definition and nature, the conclusion, and the conditions of validity of treaties. Characteristically he enunciated as his first proposition that 'treaties are agreements between States, including organisations of States, intended to create legal rights and obligations of the parties' and as his second proposition that such agreements 'constitute treaties regardless of their form and designation', thus emphasizing that the law of treaties must embrace a wide range of contemporary developments. His comments on each of the articles of his draft, in which he deliberately followed the pattern established during the inter-war period by the Harvard Research in International Law, set a standard of thoroughness for such work which has been maintained in Sir Gerald Fitzmaurice's later reports and is now widely regarded as a model for the future. A number of sections of the *Report* represent significant new departures. One of these was a series of alternative proposals concerning reservations submitted *de lege ferenda*.[2] Another was a series of propositions concerning reality of consent. The first of these declares boldly that 'treaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any State'. His justification of this proposition is one of the most cogent pieces of reasoning in all his work; it resolves itself into the thesis, in the judgment of the present writer unanswerable, that 'the cumulative result of the developments since the First World War has been to remove the foundations of the traditional rule of international law which recognised the validity of treaties imposed by force', that 'these developments consist, in the limitation and, subsequently, in the renunciation and prohibition of war, and, more generally, of force or of threats of force', and that 'it follows that a treaty imposed by or as the result of force or threats of force resorted to in violation of these instruments of a fundamental international character is invalid by virtue of the operation of the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings'.

[1] Ibid. (1953), vol. 2, pp. 90–166.

[2] These are discussed more fully below in connexion with Lauterpacht's original formulation of them before the Grotius Society.

Further articles provided that a treaty procured by fraud, or a treaty entered into under the mistaken belief, not due to fraud of a contracting party, as to the existence of a fact substantially affecting the treaty as a whole, is voidable, at the instance of the International Court of Justice or, if the parties so agree, of any other international tribunal, at the option and at the request of the party injured or adversely affected by the mistake.[1] A third section of the *Report* deals with the legality of the object of the treaty. This section includes an article declaring that 'a treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice'[2] and an article dealing with consistency with prior treaty obligations based on the general principle that 'a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties'; in stating the principle in these terms Lauterpacht was reaffirming the view which he had expressed in 'The Covenant as the Higher Law' and 'Contracts to Break a Contract'. Lauterpacht's *First Report on the Law of Treaties* brought all his characteristic freshness of approach and vigour to the examination of a branch of the law which called for such a revaluation in the light of the fundamental change which had taken place in the status of war and force in international law.

Lauterpacht's *Second Report*[3] consisted of revised articles with comments relating to the essential requirements of a treaty, ratification, accession, reservations and consistency with prior treaty obligations. He envisaged a further report on the operation and implementation of treaties but before submitting it relinquished membership of the International Law Commission on election as a Judge of the International Court of Justice. He was then succeeded as Special Rapporteur on the Law of Treaties by Sir Gerald Fitzmaurice.

In addition to his reports for the International Law Commission, Lauterpacht wrote three groups of papers dealing with special problems of the law of treaties, namely, preparatory work, restrictive interpretation and the principle of effectiveness, and the problem of reservations.

Preparatory Work

He discussed preparatory work in a major article for the *Harvard Law Review*[4] and a course of lectures at The Hague,[5] pointing out that 'while the interpretation of treaties, constitutes the bulk of international arbitra-

[1] Articles 13 and 14, pp. 152–4. [2] Article 15.

[3] *Yearbook of the International Law Commission* (1954), vol. 2, pp. 123–39.

[4] 'Some Observations on Preparatory Work in the Interpretation of Treaties', *Harvard Law Review*, No. 4, 48 (February 1935), pp. 549–91.

[5] 'Les travaux préparatoires et l'interprétation des traités', *Recueil des Cours*, 48 (1934–II), pp. 713–819.

tion, the consideration of preparatory work has been the most persistent feature of the process of interpreting treaties.[1] Lauterpacht, after weighing the practice of municipal tribunals in respect of contracts, statutes and treaties, and the practice in international adjudication, pleaded for what is essentially a balanced approach to the problem. Preparatory work should not be arbitrarily excluded on formal grounds; but neither should arguments based on the preparatory work be received uncritically:

'An important consideration which courts have constantly to bear in mind in sifting evidence of this character is that the object of interpretation is to elicit the common intention of both parties, and not of one party only. Unless the declaration of intention of a party is instrumental in disclosing the common intention of all signatories, its value is limited. What one party understood by the treaty is of little importance if the other party disagreed with that interpretation, or if circumstances show that it could not be expected, or that there was no opportunity to repudiate it expressly. For in the atmosphere of international conferences an unpalatable proposal or interpretation is not always expressly rejected.[2] . . .

'While any undue prominence given to technical rules limiting recourse to preparatory work is harmful, it is important to keep in mind a factor which is common to treaties as well as to contracts and statutes: they are all juridical acts which represent the final expression of the will of their authors. The presumption of law, and of common-sense, is that it is this final expression of will, and not anything which may have preceded it, that reveals with decisive effect the legally relevant intention of the parties. It is of little importance whether we clothe this principle in the garb of a substantive or procedural doctrine; whether we give it the name of the principle of merger, or of integration of legal acts, or of 'best evidence', or of exclusion of parol evidence. The result is the same. The principle that the final instrument supersedes the former conflicting expressions of intention is not a rigid principle of legal formalism but a necessary requirement of legal certainty, justice and convenience. In this sense the principle of merger must be constantly kept in mind as a summons to caution whenever preparatory work is resorted to for the purpose of interpretation.[3] . . .

'There is all the difference between using declarations made in the course of negotiations for the purpose of interpreting a final agreement and regarding them as the agreement itself. The intentions, possibly of an uncompromising nature, revealed prior to the signature of the treaty may have undergone a change in the course of the process of the mutual *quid pro quo*. What ultimately matters in the process of interpretation is the common intention of the parties, not the intention of one of them as expressed in his drafts or declarations—except when there is evidence to show that the point of view there expressed has been accepted by the other party. But even that may not be enough, for what is decisive is not only the common intention of the parties, but their common intention at the time of signature, namely, their intention as expressed in the treaty.'[4]

Restrictive Interpretation and the Principle of Effectiveness

The fullest expression of Lauterpacht's views on restrictive interpretation and the principle of effectiveness in the interpretation of treaties is to

[1] *Harvard Law Review*, 48 (1935), p. 549.
[2] Ibid., p. 582.
[3] Ibid., p. 586.
[4] Ibid., p. 590.

be found in his article on the subject in the 1949 *British Year Book*[1] which reproduces certain parts of his report on the interpretation of treaties for the Institute of International Law. He formulated the essence of his position in two series of propositions. As regards the principle of effectiveness he wrote that:

'Unlike the rule of restrictive interpretation of international obligations, the principle of effectiveness constitutes a general principle of law and a cogent requirement of good faith. It finds abundant support in the practice of international tribunals. On the other hand, the principle of effectiveness is in the last resort no more than an indication of intention, to be interpreted in good faith, of the parties. It is the intention of the authors of the legal rule in question—whether it be a contract, a treaty, or a statute—which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means—including the rules of construction—to discover the intention of the parties; to avoid using rules of interpretation as a ready substitute for active and independent search for intention; and to refrain from neglecting any possible clues, however troublesome may be their examination and however liable they may be to abuse, which may reveal or render clear the intention of the authors of the rule to be interpreted.'

There was, however, a natural limit to the principle:

'It is a principle which can give life and vigour to an intention which is controversial, hesitant or obscure. It cannot be a substitute for intention; it certainly cannot claim to replace it.'

The alleged principle of restrictive interpretation cannot, in Lauterpacht's view, claim any similar authority:

'The principle of restrictive interpretation of contractual obligations is not a general principle of jurisprudence. It is due to a large extent to the historical peculiarities of *stipulatio* in Roman law. It is of doubtful—if any—application in other systems of law. In the matter of treaties it has received no substantial support either from international tribunals in general or from the International Court in particular.'

While these views did not command the full approval of the Institute of International Law,[2] they correspond entirely, in the humble submission of the present writer, to the contemporary needs of international society.

Reservations to Treaties

The paper on reservations which Lauterpacht read before the Grotius Society in 1953[3] was prompted by the Advisory Opinion of the International Court in the *Genocide Case*.[4] His general view was that while 'it is not feasible or consistent with principle to recognise an unlimited right of any State to become a party to a treaty while appending reservations,

[1] 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', this *Year Book*, 26 (1949), pp. 48–85.

[2] *Annuaire de l'Institut de Droit International*, 46 (1956), t. 2, pp. 317–49.

[3] *Transactions of the Grotius Society*, 39 (1953), pp. 97–118.

[4] *I.C.J. Reports*, 1951, p. 15.

however sweeping, arbitrary or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties', the requirement of 'unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations' is 'unreasonable and out of keeping with the necessities and the feasibility of international intercourse' and 'open to objections of an order similar to that to which the rule of absolute unanimity is open in other spheres'. This constitutes a strong case for the inclusion in general conventions of provisions indicating the extent to which reservations are to be regarded as admissible and establishing a procedure for passing on doubtful reservations, but in so far as it may tend to imply that the decision in the *Genocide Case* may be of more general application must be regarded as controversial. Lauterpacht was perhaps somewhat inclined to regard the requirement of unanimous consent to a reservation as a survival from the outmoded principle of unanimity as a condition of the validity of decisions by international bodies and to underestimate the extent to which it was designed to safeguard the results of collective negotiation and agreement against processes of erosion which may greatly increase the difficulty of securing any satisfactory collective result. 'A treaty', he wrote, 'cannot aspire to an excellence transcending the attitude of the parties to it';[1] this may well be true, but the attitude of the parties towards general conventions may in many cases be influenced substantially by the extent to which the rules governing the admissibility of reservations place a premium upon or sharply discourage inertia in making the legislative and administrative adjustments frequently necessary to secure reasonably uniform application of a general convention. Among the possible solutions of the problem which Lauterpacht envisaged was a system whereby reservations would be regarded as acceptable unless objected to within three years by one-third of the parties; this, however, would place the whole weight of inertia behind the acceptability of the reservations and Lauterpacht himself concedes that 'the result might be that reservations would be upheld which are destructive of or inconsistent with the purpose of the treaty'.[2] Among other and, it is submitted, more hopeful possible solutions, he envisaged determination of the admissibility of reservations by an international body given authority for the purpose and determination of the admissibility of reservations by way of summary judicial procedure.

The Freedom of the Seas

Lauterpacht also wrote extended articles on two other subjects pending before the International Law Commission, certain aspects of the law of the sea and the jurisdictional immunities of foreign States. In 'Sovereignty

[1] Ibid., at p. 101.

[2] Ibid., at p. 123.

Over Submarine Areas'[1] he examined the emergence of the conception of the continental shelf as an illustration of 'the more general issue of the adaptation of international law, labouring as it does under the absence of effective machinery for creating and changing the law, to fresh needs and conditions of the international community'. In so doing he restated the basis of the traditional conception of the freedom of the seas:

'Its authority and continued usefulness can be safeguarded only if it is acted upon in accordance with its true purpose and the ever-valid test of reasonableness. Its true purpose is to ensure freedom of navigation, unhampered by exclusive claims of individual states, and freedom of utilisation of the resources of the sea to a degree to which they can be equitably utilised by all. The resources of the submarine areas adjacent to the coast of the state cannot be feasibly and reasonably utilised by all. They can be so utilised mainly by the adjacent coastal state. . . . Once the principle permitting the use of parts of the sea for erecting or placing permanent installations for operation on the sea-bed or its subsoil is admitted as valid, its application becomes to a large extent a matter of machinery and procedure. . . . Evaluation of conflicting interests and the effective recognition of those which, on balance, are entitled to protection is a constant feature of judicial activity as, indeed, of law in general.'[2]

This general approach anticipated the subsequent outcome of the First United Nations Conference on the Law of the Sea.

Jurisdictional Immunities

Lauterpacht re-examined the jurisdictional immunities of foreign States[3] in the light of the contemporary 'challenge to the prerogatives of the sovereign State which denies to the individual legal remedies for the vindication of his rights as against the State in the matter both of contract and tort, and which asserts a privileged position for the State in the procedural sphere', contending that 'public opinion and practical considerations do not permit too wide a gap between the law governing the immunities of the home State and the law, which many regard as increasingly artificial, unjust and archaic, relating to the immunities of foreign States'. He saw a relationship between the limitation of jurisdictional immunities and 'the incipient recognition of human freedoms as part of positive international law'. While all of this may, and indeed must, be conceded, Lauterpacht himself acknowledged that 'the view that there is at present no rule of international law which obliges States to grant jurisdictional immunity to other States is, admittedly, unorthodox', and neither the International Law Commission nor Governments have been prepared to go so far; nor does he appear to grant any explicit recognition to the extent to which international immunities may have a new and vital func-

[1] This *Year Book*, 27 (1950), pp. 376–433.
[2] Ibid., pp. 407–8 at 409.
[3] 'The Problem of Jurisdictional Immunities of Foreign States', ibid., 28 (1951), pp. 220–72.

tion to perform in enabling international organizations to escape unilateral interference by their individual member States.[1] But the general concept that immunities must be circumscribed by, rather than a derogation from, the rule of law is both valid and typical of his approach to all the unresolved problems of the law.

The Relationship of International with Municipal Law

The relationship of international law with municipal law was one of the recurrent themes which runs through most of Lauterpacht's writing, but two articles on the subject call for special mention, his paper 'Is International Law a Part of the Law of England?' read before the Grotius Society in 1939[2] and his article on 'Decisions of Municipal Courts as a Source of International Law' which appeared in the *British Year Book* ten years earlier.[3] In his Grotius Society paper, the title of which he borrowed with a respectful acknowledgement from Westlake, Lauterpacht reaffirms the doctrine of incorporation as enunciated by Blackstone and Mansfield and restated in more recent times by Lords Alverstone, Phillimore and Finlay, discards the criticism of the traditional doctrine by Oppenheim and Picciotto[4] and characterizes the doctrine as 'a beneficent and progressive legal tradition'. While welcoming the recognition implied by the doctrine that the rules of international law 'regulate the conduct and the obligations of individuals in matters affecting the international relations of the State', that 'the benefits of customary international law may accrue directly to the individual', and that there is 'a fundamental jurisprudential identity between international law and municipal law', he stresses also the practical advantage that 'by endowing at least some rules of international law with that high degree of enforceability which is common to the rules of municipal law administered by the State, the doctrine of adoption adds authority to the rules of international law in a world in which these rules are only imperfectly observed'. After reviewing fully the positivist attack on the doctrine of adoption Lauterpacht concludes by warmly championing it:

'These are the reasons why, far from being a source of embarrassment, the doctrine of adoption ought to be looked at as a principle which, without subordinating one system of law to the other, adds to the authority both of municipal law and of the law of nations. In periods of crisis in the international sphere, whenever there reveal themselves tendencies to substitute for the authority of the law of nations an uneasy and precarious balance of physical forces, the task of municipal tribunals in administering and upholding at least some portions of International Law, forming part of the municipal system and rendered real by the sanction of the State behind it, acquires

[1] Cf. Jenks, *International Immunities* (1961).
[2] *Transactions of the Grotius Society*, 25 (1939), pp. 51–88.
[3] This *Year Book*, 10 (1929), pp. 65–95.
[4] *The Relation of International Law to the Laws of England and the United States* (1915).

special significance. There are no indications that Courts are inclined to jettison or seriously to curtail, in the country of its origin, a beneficent and well-established legal doctrine which has now spread wide beyond its original confines, which has been fully adopted in the United States, and which other countries have justly regarded as a symbol of catholicity in matters international. It represents a legal principle which must in the future, as it has done in the past, constitute an object of emulation in times in which the external relations of States are allowed to pursue their course in the channels of the inevitable progression towards the political integration of mankind. That final development, when it comes to pass, will prescribe for municipal Courts the supremacy of the law of nations over the law of the land—a consummation which will go much beyond the doctrine of adoption as now operative in this or any other country.'[1]

In 'Decisions of Municipal Courts as a Source of International Law'[2] Lauterpacht examines the relationship of international and municipal law in reverse. He protested against 'the impression that the interest in internationally relevant municipal case law is a peculiarity of English and American international lawyers unduly generalising their passion for case law' and found such an attitude harmful:

'It has deprived international law of a fruitful source of development, and has diminished the opportunities for taking advantage of the lessons of judicial treatment of international law in a world in which these opportunities are not frequent. As an unavoidable consequence, it has tended to impair in municipal judges administering international law the consciousness of being—on a higher plane—the organs and trustees of the international legal community bound to apply international law with the utmost care and impartiality in the spirit of that unity of international and municipal law which is the goal of legal development.'

The article is an impressive plea for fuller study of the decisions of municipal courts now made so much more readily available in the *Annual Digest* and the *International Law Reports*. It concludes with a practical suggestion which still merits current consideration:

'By not availing themselves to the full of the lessons of municipal decisions international lawyers have debarred themselves from access to a rich source of development of international law. In the long run such an attitude cannot fail to impair in those called upon to render these decisions the sense of responsibility for a comprehensive and scientific treatment of international law. It would be of advantage if judges could know that their decisions on matters of importance to international law are studied not only by the lawyers of their own country, but also, through a system of easily accessible reports, by scholars and students abroad, intent upon learning from judges conscious of the international character of their functions. From this point of view, one may consider the possibility of a development in which the highest national tribunals will prefer to ask competent international tribunals, preferably the Permanent Court of International Justice, sitting in its full strength, for an opinion on difficult or unsettled questions of international law which do not involve national interests. In a more integrated stage of international organization—which is still far off—this request

[1] *Transactions of the Grotius Society*, 25 (1939), pp. 51–88.
[2] This *Year Book*, 10 (1929), pp. 65–95.

for an opinion might assume the form of leave to appeal against the decision of the national court on a point of international law. It is not unusual for inferior municipal courts to invite an appeal from their own decision on questions of legal interest on which the opinion of the highest organs of the judiciary is felt to be desirable. However, a formal application, emanating from the highest judicial authorities of the country and addressed to the Permanent Court, for a ruling on any important question of international law pending before the municipal court would constitute a less radical step. Such a procedure, being a voluntary one in form and substance, would derogate neither from the sovereignty of states nor from the authority of their highest tribunals; it would testify that these tribunals regard themselves as the organs of the international community when administering international law, and it would give the Permanent Court, whose main work consists at present in interpreting treaty provisions, the opportunity of developing international law in much-needed directions. A suggestion of a procedure of this kind naturally raises a number of questions, such as the right of the Court to deal under its present constitution with matters referred to it in this way, and the necessity of appropriate changes in the Statute; the desirability of reserving to the Court the right to decide whether the matter raised in the application for an opinion is important enough to put into motion the machinery of the Court; the definite obligation, moral rather than legal, on the part of the municipal court in question to give effect to the ruling of the Permanent Court. These are questions of detail which need not be discussed here. But it is believed that such an innovation would bring into relief the deep significance of the fact that international law is the only branch of law containing identical rules professedly administered as such by the courts of all nations.'[1]

The Future Development of the International Court of Justice

The greater part of Lauterpacht's occasional writings on international adjudication was subsequently absorbed in *The Function of Law in the International Community* and *The Development of International Law by the International Court*, but to this generalization there is one major exception. A memorandum on the revision of the Statute of the Court found in his papers after his death envisages that the Court itself should, in pursuance of Article 70 of the Statute, play an important part in the future amendment of the Statute. While refraining from making proposals on matters relating to the election of judges (apart from certain questions of procedure) and the composition of the Court which may call for further consideration, the Court might make valuable proposals for the adaptation of its jurisdiction and procedure to changed needs. These might include proposals concerning the parties entitled to appear before the Court in both contentious and advisory proceedings:

'While it might appear desirable to set a limit upon the procedural capacity, before the Court, of international organisations with regard to the constitutional aspects of both their internal and mutual relations as well as in respect of their capacity to appear as plaintiffs and defendants in contentious proceedings, it is clear that a re-examination of the present restrictive formulation of Article 34 of the Statute is called for having regard to the position which international organisations have acquired in pursuance

[1] This *Year Book*, 10 (1929), pp. 94–95.

of a series of multilateral treaties. Similar considerations apply to the procedural capacity of individuals. While in the present state of international organisation it appears premature to make available the compulsory jurisdiction of the Court in favour of or against individuals, reasons have been adduced why the terms of Article 34 of the Statute might be suitably modified with a view to enabling the Court to exercise jurisdiction in cases in which such jurisdiction is conferred upon it by the consent of governments. In a different sphere there is room—by reference to the question of the parties entitled to set in motion the jurisdiction of the Court—for a consideration of the proposal to confer upon the highest municipal courts of States which are parties to the Statute the power to have recourse to the advisory jurisdiction of the Court for the elucidation and determination of questions of international law of general importance.'

Among other suggestions contained in the memorandum was a proposal that interim measures of protection indicated by the Court should become mandatory; that the Court should, following the precedents of the *Behring Sea Arbitration*, the *North Atlantic Fisheries Case* before a Permanent Court of Arbitration Tribunal, and a number of the awards of the British–American Claims Arbitration Tribunal under the Convention of 1910, be at liberty, if so requested by the parties, to make—in addition to, but not in substitution for, a legal decision—recommendations, which are not 'of a binding character, for a modification of the legal position as established in its judgment'; and that consideration should be given to the possible future organization of the Court in divisions. The suggestion that the Court should be authorized to make recommendations, which are not binding, for modifications in the legal position reappears in his last article, that on ' "Non Liquet" and the Completeness of the Law' in the *Symbolae Verzijl*.[1]

'*Contracts to Break a Contract*'

'Contracts to Break a Contract'[2] was written as an act of virtuosity in circumstances of which I have a vivid personal recollection. Lauterpacht and myself were sitting together for our bar finals at the time and the article was written partly and perhaps primarily as a release from the humdrum routine of bar final cramming. His interest in the subject arose out of his study of 'The Covenant as the Higher Law'[3] which had been prompted by the controversy concerning the extent to which commercial and similar treaties were an impediment to the application of sanctions against Italy under the Covenant of the League. His general conclusion was that a contract to break a contract is illegal, subject to exceptions engrafted upon the rule by the Courts or by Statute and to further examina-

[1] (1958), p. 219.
[2] *Law Quarterly Review*, No. CCVIII (October 1936), pp. 494–529.
[3] This *Year Book*, 17 (1936), pp. 54–65.

tion of the best way of disposing of the difficulties arising out of its application. The article continues to be a *locus classicus* on the subject.

The British Year Book of International Law

Lauterpacht was editor of this *Year Book* from 1944 to 1955. There has been no more memorable editorship of any international legal periodical. Lauterpacht succeeded to a great tradition. Hurst, Pearce Higgins, Brierly, Fischer Williams and McNair had all held the editorship before him, alone or as colleagues, for varying periods, but all of them would have recognized how much he contributed to the traditions which they bequeathed to him. There were three salient features in his conception of his task. He had a ruthless impatience with hasty and careless work which kept the standard of the *Year Book* consistently high; status or reputation gave no access to its pages; quality was the only test. He felt a special responsibility for encouraging the young research worker and took infinite pains to assist a whole series of younger men and women to reach the standard on which he insisted before accepting their work for publication. The final test which he always endeavoured to apply was how an article would stand the test of time; he was determined that the *Year Book* should not be cluttered up with material of ephemeral interest but should be a recognized repository of solid work of permanent value; his marked preference for articles, or in some cases series of articles, approaching the dimensions of a monograph was notably influenced by this attitude.

The Annual Digest, International Law Reports and the projected *British Digest of International Law*

The Annual Digest of Public International Law Cases, edited by Lauterpacht originally in co-operation with McNair[1] and then in co-operation with Fischer Williams,[2] was subsequently continued for a further thirty years under his sole editorship. In the 1933–4 volume the title was changed to *Annual Digest and Reports of Public International Law Cases* in order to reflect a policy of reproducing literally as far as possible the relevant parts of judgments and awards. From the outset the ultimate objective was a series of international law reports and with the 1950 volume Lauterpacht regarded this objective as sufficiently achieved to justify rechristening the series as *International Law Reports*. At the time of his death twenty-three volumes had appeared and two further volumes were in preparation. While the *International Law Reports* owe much to a faithful band of contributors from many countries, upon whom there now devolves the task of continuing the series, all of them would acknowledge that Lauterpacht

[1] 1925–6 and 1927–8 volumes.

[2] 1919–22 and 1923–4 volumes.

was the soul of their common endeavour. The purpose of the series was stated in the preface written jointly by McNair and Lauterpacht for the first volume to appear, that for 1925–6:

> 'The work of which this book is the first fruits was prompted by the suspicion that there is more international law already existing and daily accumulating "than this world dreams of" and by the conviction that it is more international law that the world wants. As the work has progressed the suspicion has ripened into certainty.'[1]

The preface expressed the conviction that, before half the twentieth century had elapsed, international law would have been 'developed from judicial sources almost out of recognition'. The *Annual Digest* and *International Law Reports* now enable us to judge how well founded that expectation was. Lauterpacht's editorship of them was comparable to Sir Frederick Pollock's editorship of the *Law Reports*. In some respects his task was more difficult; he had no trained staff of professional reporters at his disposal but was dependent on the co-operation of voluntary contributors in many countries; the result was accordingly inevitably somewhat uneven, but when every legitimate criticism has been fully weighed the result remains a massively impressive one. The *Annual Digest* and *International Law Reports* have been for over thirty years an indispensable instrument of the process whereby judicial precedent is being gradually substituted for formless custom as the typical expression of international law. It is less generally known that it was Lauterpacht who pioneered the plan for a *British Digest of International Law* and even less widely appreciated how long ago he first launched the idea. The Lauterpacht papers contain a copy of a letter written on behalf of the London School of Economics on 22 November 1929 by Professor H. A. Smith to Dr. Hugh Dalton, then Parliamentary Under-Secretary of State for Foreign Affairs, suggesting the preparation of such a digest and attributing the suggestion to Lauterpacht. The plan, though long delayed, is now being vigorously pushed and there is every prospect of its realization within the next decade.

Lauterpacht as Judge

Lauterpacht's work as a Judge of the International Court of Justice would need a separate study and only a brief comment can be made upon it here. His reputation was tending to become, like that of Anzilotti in an earlier generation, or that of Holmes or Brandeis on the Supreme Court of the United States, that of the great dissenter. But he did more than any other man to discredit the exclusion from the jurisdiction of the Court of matters of domestic jurisdiction as determined by the parties; no one had a higher or more exacting conception of the judicial office; no one felt

[1] *Annual Digest of Public International Law Cases*, 1925–6, at p. ix.

more keenly a sense of judicial responsibility for resolving rather than evading issues; he carried into the highest judicial office the earnestness of his prophetic mission and his place among the great international judges is secure.

Lauterpacht as Jurist

When we review Lauterpacht's work as a whole certain persistent features of his thought stand out as specially significant: its essentially moral foundation; the confluence of speculative legal philosophy with the pragmatism of the common law tradition; the subtlety and persistence of his logic, always combined with a rich, and not infrequently with an unparalleled, armoury of precedent; his unvanquished but never heedless optimism in fair weather and in foul; his profound distrust of 'realism', coupled with an appreciation, no less full because somewhat reluctant and uncongenial, of the need for the idealist to make compromises with practical men; his unfailing sense of the urgency of the great issues confronting international law in our time. He lived for human freedom and human dignity; he loathed cant; and he regarded the law as a vehicle for the expression of ethical values and moral ideals. The law as he found it, particularly as expounded by the great positivists, fell altogether short of this ideal; he made it his mission to refashion it. He was fortunate in coming to maturity with the generation which regarded the Covenant and the Pact of Paris as the cornerstone of a new world order, and, without cherishing for any substantial time any unpardonable illusions, remained constant throughout in the faith that the whole future of man depends on the extent to which the great vision originally enshrined in the Covenant can be made a reality. All the essentials of his thought—his acceptance of the concept of the common law of mankind (albeit as a distant ideal),[1] his recognition that the basis of obligation in international law lies in the will of the international community,[2] his insistence on the continuing importance of natural law,[3] his rejection of 'reason of State',[4] his repeated emphasis on the place of international law as an element in a universal legal order,[5] the stress he placed on the identity in legal nature of the relationships governed by international and those governed by municipal law;[6] his comprehensive and conclusive demonstration that there is no limit to the possibilities of judicial settlement except the willingness of the parties to abide by the result,[7] his penetrating and bold analysis of the

[1] *The So-Called Anglo-American and Continental Schools of International Law.*
[2] *The Nature of International Law and General Jurisprudence.*
[3] *International Law and Human Rights.*
[4] *The Function of Law in the International Community.*
[5] E.g. *Règles générales du droit de la paix.*
[6] *Private Law Sources and Analogies of International Law.*
[7] *The Function of Law in the International Community.*

international judicial process,[1] his repeated pleas for an interpretation of the Covenant which would make it an effective instrument of international order,[2] his trenchant appraisal of the fundamental changes wrought in the law by the Pact of Paris and in particular of its effect on neutrality, his determination to maintain a final barrier against barbarism in the law of war, his resolve that war crimes should not pass unpunished, his interest in codification, the vigour and freshness with which he attacked the crucial weakness of the law of treaties, his abiding belief that law and the State exist for man and that the effective protection of human rights is the primary object of international society—all this stemmed from this faith and the determination which it inspired. In all of these respects he gave cogent expression to the thinking of a whole generation of international lawyers. By its nature this body of thought does not permit of evaluation by detached intellectual criteria; ultimately, its validity depends on its impact, and while that impact has clearly been far-reaching it cannot yet be seen in perspective and from a long-range point of view may well depend on political, economic and social forces which cannot yet be accurately assessed or perhaps even foreseen. This much, however, is certain: that so long as international lawyers cherish the ideal of the *civitas maxima* they will find in Lauterpacht's writings a cogently argued body of reasoning reflecting all the most vital preoccupations of the perennial quest for freedom under law; and that the extent to which thought and action follow the general lines of his approach will determine in large measure how far humanity achieves the proud ambition of so organizing itself in a world order under law as to attain the objects set forth in the Covenant of the League of Nations and reaffirmed in the Charter of the United Nations.

Lauterpacht as Prophet

The final appraisal of Lauterpacht's work is a task for future generations. One who shared his general outlook, hopes and anxieties for upwards of thirty years cannot now claim to see it in perspective, but there is something which only those who knew him intimately can and must convey fully to future generations of international lawyers. The outstanding quality of the man was his moral stature. He believed that human society has outgrown its political framework; that scientific and technological advances have created a world in which moral standards and political institutions have failed to keep pace with ever more complex and urgent needs; that the resulting crisis jeopardizes fundamental ethical values and all that we should treasure most highly in our cultural heritage, and may jeopardize

[1] *The Development of International Law by the International Court.*
[2] E.g. *Japan and the Covenant; The Covenant as the 'Higher Law'.*

the future of the human race itself; that living through one of the grand climacterics of history the international lawyer, while unable as such to affect decisively the course of events, nevertheless can and must assume a full measure of responsibility for promoting and guiding the development of a legal order rooted in freedom, founded on justice, and dedicated to the maintenance of peace. As scholar, as teacher, as editor, as adviser to Governments and counsel, as codifier and as judge, he approached every task which fell to his lot with a sense of mission compounded by a sense of overriding urgency. He was never satisfied to rest content with determining how the accepted law stood; he consistently recognized an obligation to the future and attempted to make the law a vehicle of moral and political wisdom and progress. While conceding the importance of economic issues and problems he was much less interested in them; the basis of his thought lay in his attachment to ethical and spiritual values. The word 'messianic' has sometimes been used in this connexion but is apt to be misleading; there was nothing savouring of fanaticism in Lauterpacht's approach to any question; modesty, humility and the sweet reasonableness of good fellowship were the essence of his nature; but the breadth and depth of his learning and scholarship and his infinite subtlety of resource in argument were consistently consecrated to one supreme end, so to advance in our time the rule of law among men as to secure freedom, do justice and promote mercy; his utter disinterestedness was at all times altogether beyond suspicion; his highest value was integrity; he may not have suffered fools gladly, but his only scorn was a scorn for 'impartiality' between right and wrong; and subtle as was his resource in argument his concepts of right and wrong were of biblical simplicity. While no one was less self-righteous, no one believed more profoundly in righteousness and no one practised more consistently righteousness tempered by mercy and charity.

THE INTERNATIONAL LAW COMMISSION, 1949–59*

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Introduction

THE purpose of this article is to examine some aspects of the interplay of the various major factors having a bearing on the International Law Commission and the role which the Commission, and through the Commission the codification of international law, is assuming in contemporary international intercourse. This study is, however, in the main limited to a descriptive and tentative appraisal of the position of the Commission—and hence of the movement for the codification of the law—within the framework of the United Nations: it is concerned neither with a scientific evaluation of the Commission's work for the substantive content of modern international law—an aspect with which an article could not possibly deal adequately—nor with any attempts at the codification or progressive development of the law through other organs. In order to be able to reach any conclusions regarding the function of codification of the law through the Commission and of the organs responsible for that type of codification in the context of modern diplomatic processes, it is necessary to consider a number of different aspects including: (*a*) the historical antecedents; (*b*) the expectations and suppositions underlying Article 13 (1) (*a*) of the United Nations Charter; (*c*) the establishment of the International Law Commission and the adoption of its Statute; (*d*) the composition of the Commission and its meetings; (*e*) the Commission's relations with other bodies, in particular the Economic and Social Council; and (*f*) the implementation of the Commission's task, and its relations with the Sixth Committee—the Legal Committee—of the General Assembly.

The source-material for a study of this nature is of considerable quantity and a selective approach is therefore necessary. To the end of the Fourteenth Session of the General Assembly (1959), the Sixth Committee had held 646 meetings of which approximately 350 were devoted to items directly or indirectly related to the Commission's work. The Commission itself has held eleven annual sessions in the period under review, 525 meetings in all.[2] Apart from this, a number of international conferences

* © Shabtai Rosenne, 1961.

[1] The views expressed herein are personal to the writer who has, however, drawn on his experience in the General Assembly and in other international conferences.

[2] Citations and abbreviations are as follows: For the General Assembly all references are taken from the *Official Records*; for the Commission, references are normally made to the *Yearbook of the International Law Commission* (abbreviated *I.L.C. Yearbook*), annually since 1949. Except

have been held, or are due to be held, to complete the work of codification on a given topic or in connexion with it; in addition the General Assembly has established several inter-sessional committees to continue work for which the initial basis was prepared by the Commission. A mere listing of these[1] is sufficient to demonstrate the broad ramifications of the contemporary codification effort, beside which previous efforts pale into insignificance; and the fact that the General Assembly has discussed aspects of the problem of codification at every one of its fourteen sessions is sufficient to establish the point that the processes of codification are part and parcel of the contemporary diplomatic (and hence political) scene.

This efflorescence of the diplomatic codification of international law is a completely new phenomenon, for which no historical parallel really exists.

for the year 1949, the *I.L.C. Yearbook* consists of two volumes, the first containing the summary records of the meetings, and the second the relevant documentation. However, this documentation is not complete. See p. 133, n. 2 below. The Commission's documentation is issued under the symbol A/CN.4/—. The annual report of the Commission to the General Assembly, issued originally in the A/CN.4/— series, is always printed as a *Supplement to the Official Records of the General Assembly*; it is also included in vol. 2 of the *I.L.C. Yearbook* (abbreviated *First Report* (1949), &c.).

There exists some misconception over the nature of the Sixth Committee of the General Assembly. Technically called the Legal Committee, it is one of the seven Main Committees of the General Assembly (Rules of Procedure, Article 101), and as such is identical in its nature with the other Main Committees, that is it is a *political* body, dealing politically with such matters as come before the General Assembly and are referred to it. Its individual members are the representatives of States and, unlike the members of the International Law Commission, do not sit on the basis of their personal or professional qualifications. The view sometimes expressed, both in the Sixth Committee and outside it, that the Committee is *intrinsically* different from the other Main Committees, and is in the position of general legal adviser to the General Assembly, is completely erroneous. It has no basis, either in the Charter, or in the Rules of Procedure, or in the history of the Sixth Committee itself (or in that of the equivalent First Committee of the Assembly of the League of Nations).

[1] The Conferences include: U.N. Conference on the Elimination or Reduction of Statelessness, convened (Geneva 1959) by Resolutions 896 (IX) of 4 December 1954 and 1107 (XI) of 21 February 1957 (documentation symbol A/CONF.9/—); International Technical Conference on the Conservation of the Living Resources of the Sea, convened (Rome 1955) by Resolution 900 (IX) of 14 December 1954 (documentation symbol A/CONF.10/—); U.N. Conference on the Law of the Sea, convened (Geneva 1958) by Resolution 1105 (XI) of 21 February 1957 (documentation symbol A/CONF.13/—); Second U.N. Conference on the Law of the Sea, convened (Geneva 1960) by Resolution 1307 (XIII) of 10 December 1958 (documentation symbol A/CONF.19/—); U.N. Conference on Diplomatic Intercourse and Immunities, convened (Vienna 1961) by Resolution 1450 (XIV) of 7 December 1959 (documentation symbol A/CONF. 20/—). The Committees include: Committee on the Progressive Development of International Law and its Codification, established by Resolution 94 (I) of 11 December 1946 (documentation symbol A/AC.10/—); Committee on International Criminal Jurisdiction, established by Resolution 489 (V) of 12 December 1950 (documentation symbol A/AC.48/—); 1953 Committee on International Criminal Jurisdiction, established by Resolution 687 (VII) of 5 December 1952 (documentation symbol A/AC.65 /—); Special Committee on the Question of Defining Aggression, established by Resolution 688 (VII) of 20 December 1952 (documentation symbol A/AC. 66/—); 1956 Special Committee on the Question of Defining Aggression, established by Resolution 895 (IX) of 4 December 1954 (documentation symbol A/AC.77/—). The expenses incurred in the meetings may be noted: the 1959 Statelessness Conference cost $31,271; the 1955 Rome Conference, $68,305; the 1958 Geneva Conference, $269,211; the 1960 Geneva Conference, $46,000 (estimated); the 1961 Vienna Conference, $200,000 (estimated); the 1947 Committee, $2,940; the 1951 Committee, $5,327. The remainder were absorbed in existing appropriations of U.N. Headquarters. (Information obtained from U.N. Secretariat.)

1. *Historical Antecedents*

The modern movement for the systematic presentation of international law in codified form had its origin, like much else, in the intellectual ferment induced by the French Revolution, although paternity of the idea is frequently ascribed to the Englishman Jeremy Bentham. During the nineteenth century the movement remained the preserve, on the whole, of academic lawyers (both individuals, and working in learned societies such as the *Institut de Droit International*) and, in retrospect, seems to have made little impression on Governments.[1] Several reasons may be advanced for this, of which perhaps the most important was the almost general absence until towards the end of the century of organized legal services within the more important Foreign Offices,[2] and of permanently existing international administrative organs comparable to the modern secretariat.[3] For among the services which this type of department can perform is to act as a link between the academic study of the doctrine of the law and the practical application of the substantive international law which is, and always has been, limited for practical purposes to the diplomatic sphere.[4] The absence of permanent international organizations, with skilled secretariats, deprived the international community of competent centralized services capable of assuring continuity and co-ordination of the widely ramified activities. What is probably the first indication of political realization of the political or diplomatic, as opposed to the academic, importance of the codification of international law is seen in The Hague Peace Conferences of 1899 and 1907 (together with the London Naval Conference of 1908–9) all of which, concerned as they were with the pacific settlement of international disputes and certain aspects of the law of war, demonstrated the important political and possibly military implications of codification.[5]

It is true that the last century also saw a considerable amount of general

[1] See U.N. Secretariat, *Note on the Private Codification of Public International Law*, doc. A/AC.10/25, 16 May 1947. While there is an obvious analogy with the codification of domestic law, the analogy must not be pushed too far, as in domestic systems the codification frequently occurs at a late stage of the law's development, and is not encountered so long as the law is in its primitive state. Cf. Dahm, *Völkerrecht* (1958), vol. 1, p. 52. But although international law is frequently said to be 'primitive', is it in truth primitive in that sense? A similar view is expressed by the Polish delegate in A/AC.10/SR.3, p. 3.

[2] See Jenks, 'Craftsmanship in International Law', in *The Common Law of Mankind* (1958), p. 408 at p. 425. On the history of the Legal Adviser of the Foreign Office in London, see statement of Sir Gerald Fitzmaurice in McNair, *International Law Opinions* (1956), vol. 3, p. 425.

[3] Jenks, op. cit., at p. 427.

[4] It is therefore significant and salutary, that several members of the International Law Commission are legal advisers of their national foreign offices; and that a high proportion of the representatives on the Sixth Committee are likewise associated with the legal departments of their respective foreign offices. It is equally salutary that the same department of the Secretariat—the Codification Division—serves not only the Sixth Committee and the Commission, but also the codification conferences and inter-sessional committees.

[5] The same is true of the Geneva Red Cross Conferences of 1929 and 1949 which, in some respects, continued the work of The Hague Conference of 1907.

law-making through the instrumentality of the collective international treaty.[1] However, the assertion occasionally heard that various instruments adopted at the Congress of Vienna (1814–15), or the Declaration of Paris of 1856, or the over 250 international instruments adopted in the over 100 international conferences held between 1864 and 1914, constitute 'conscious efforts of governments' devoted to the development of international law or its codification appears to be exaggerated. In so far as the instruments have become accepted as declaratory of general principles of law of universal application, such as the Vienna *Réglement* on diplomatic precedence or the Declaration of Paris of 1856 on certain aspects of warfare at sea, this is to a large extent a secondary development, accepted universally, of a contractual arrangement originally designed to remove serious sources of international friction.[2] However, most of the conferences and instruments of this period were not conceived as part of a conscious and sustained effort of Governments to further the development or codification of general international law but rather to deal with matters of immediate concern, not presently regulated by general international law, and of a significance relatively limited, in substance or geographically. In the broader sense, it is true, much detailed law was produced in this way, and it is probably equally true that by now some underlying principles may, in a more nebulous form, have found their way into the reservoir of general international legal principles.[3] This production of legal norms has been continued by the League of Nations and by the United Nations, as well as by various regional organizations in different parts of the world, at an

[1] See U.N. Secretariat, *Historical Survey of Development of International Law and its Codification by International Conferences*, doc. A/AC.10/5, 29 April 1947; id., *The Codification of International Law in the Inter-American System with special reference to Methods of Codification*, doc. A/AC.10/8, 6 May 1947. This material is largely recapitulated in Liang, 'Le Développement et la codification du droit international', in *Recueil des Cours*, 73 (1948), p. 411. For a bibliography on codification, see doc. A/AC.10/6, 2 May 1947.

[2] On the frictions generated by questions of diplomatic precedence, cf. Satow, *Guide to Diplomatic Practice* (4th ed., 1957), chapters iv and v. The reorganization of the system of diplomatic precedence was rendered essential after the Napoleonic Wars 'had so upset the hierarchical tables'. Thayer, *Diplomat* (1959), p. 226. The questions regulated in the Vienna Regulation occupy but two Articles (15 and 16) out of the 45 Draft Articles on Diplomatic Intercourse and Immunities prepared in 1958 by the International Law Commission, which will form the basis for the work of the 1961 Conference referred to in n. 1, p. 105 above. The Declaration of Paris arose out of certain practical requirements of Great Britain and France in the conduct of the Crimean War. See Malkin, 'The Inner History of the Declaration of Paris', in this *Year Book*, 8 (1927), p. 1. The provisions of the Declaration of Paris were hardly touched by the abortive Declaration of London of 1909, and neither withstood the major test of the two world wars. The attempt to codify this branch of the law has not been repeated. In 1949 the International Law Commission was opposed to study of the problem of the laws of war 'at the present stage'. *First Report* (1949), para. 18.

[3] For instance, much pioneer work in the sphere of international organization originated in this period, and the experience thus gained is of value in connexion with an understanding of the legal problems of modern international organization. For an important attempt to present a unitary and synthetic theory of the legal basis of international organization in this sense, see Sereni, *Le Organizzazioni Internazionali* (1959); id., *Diritto Internazionale*, vol. 2, part 2 (1960).

increasing pace. But it is doubtful if this type of work really comes or is intended to come within the scope of the development or codification of international law as generally understood—which operates within the boundaries of general customary international law—or within that of the International Law Commission.[1]

The first modern recognition of the necessity to shift the emphasis of the codification of customary international law from academic circles into the political arena was provided by the 1920 Committee of Jurists appointed to draft the Statute of the Permanent Court of International Justice. Impressed by the argument that recourse to the Court would be impeded by the absence of a clear statement of what the rules of international law are, that Committee adopted a long resolution on the topic, the central feature of which was the suggestion to resume the work of the Peace Conferences of 1899 and 1907 under the auspices of the League.[2] The First Assembly of the League, however, took no action, not for technical but for political reasons. It fell to Lord Cecil, of all people, to express this political opposition, and he used the telling phrase that at the time there was insufficient 'calmness of public mind' to permit a useful intergovernmental effort at codification to be undertaken.[3] Here is the first modern example of the significant clash between political reality and legal idealism, but the lessons of this were not to be fully learnt until after the Second World War.

A few years later, in 1924, the Assembly renewed its interest in the matter, which it termed the 'progressive codification' of the law. At the end of the year the Council appointed the Committee of Experts for the Progressive Codification of International Law, of seventeen members, and after certain consultations with Governments and the Council the Assembly decided, in 1927, to codify three topics—nationality, territorial waters and the responsibility of States—at a diplomatic conference, to be prepared by a Preparatory Committee which was to draw up not draft Conventions as

[1] The two types of activity may sometimes overlap. An instance of this is seen in the fact that both the Commission on Human Rights and the International Law Commission have been given assignments in the matter of the right of asylum. See p. 140, n. 4 below.

[2] P.C.I.J., Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (1920), p. 747. For a vehement denial that the absence of codified law would impede the international judge, however desirable for other reasons codification may be, see Merignhac, *Traité théorique et pratique de l'arbitrage international* (1895), p. 445. The experience of the Permanent Court and since shows that any fears on this score have, fortunately, not been substantiated; and it is significant that in 1945 the question of the necessity for codification was approached from quite a different point of departure. See pp. 109 et seq. below. Nevertheless, the idea appeared again in the resolution adopted by the League Assembly on 26 September 1928 in which, while urging States to sign the Optional Clause, the Assembly expressed the hope that the codification efforts would diminish the uncertainties and supply the deficiencies of international law, and thus facilitate the acceptance of the Optional Clause. League of Nations, *Official Journal* (*Special Supplement*, No. 64), p. 183. On this aspect, see in general Lauterpacht, *The Function of Law in the International Community* (1933).

[3] See *Records of the First Assembly* (1920), Third Committee, pp. 326–9, Plenary Meetings, pp. 743–7, 763. Lord Cecil was speaking as a delegate for South Africa.

had been proposed by the Committee of Experts, but 'bases for discussion'. The Codification Conference was in session at The Hague from 13 March to 12 April 1930, with meagre results which are well known.[1] The experiment in codification was not resumed by the League, despite desultory discussion in the Assembly which, in 1931, even adopted an important resolution on the *procedure* of codification.[2] The underlying theme of this resolution was the strengthening of the influence of Governments, in addition to purely technical considerations, in the actual work of codification—in other words the closer integration of the work of codification with international politics in general; and many of its ideas were subsequently incorporated in the Statute of the International Law Commission.

2. *The San Francisco Conference and Article 13 (1) (a) of the Charter*

A significant feature of the Dumbarton Oaks Proposals of 1944 on the future international organization[3] was the absence from them of recognition of the role of law in the organized international community. This stood in marked contrast to the League Covenant, and attracted adverse comment from several Governments at the time. Specific suggestions for amending chapter V, section B, paragraph 6 of the Proposals, relating to the powers of the General Assembly in the matter of political co-operation and adjustment of situations likely to impair the general welfare, so as to include recognition of a possible role for the Assembly in the development of international law, were made by Australia, China and Liberia, and were accepted by the four sponsoring Governments.[4] At the San Francisco Conference, the idea was referred to Committee II/2, and discussed in Sub-committee II/2/A.[5]

The proposed amendments of paragraph 6, in so far as they related to the codification of international law, were found to raise four questions of principle, namely: (1) Should the General Assembly be empowered to initiate studies and make recommendations for the codification of international law? (2) Should it be empowered to initiate studies and make recommendations for promoting the revision of the rules and principles of international law? (3) Should it be authorized to enact rules of international law which should become binding upon members after such rules shall

[1] For this phase of the League's activity, see doc. A/AC.10/5 cited on p. 107, n. 1, above. And see Baker, 'The Codification of International Law', in this *Year Book*, 5 (1924), p. 38; 'C', 'The Progress of Codification in 1927', ibid. 9 (1928), p. 113; Anon., 'First Conference for the Codification of International Law', ibid. 11 (1930), p. 177; Brierly, 'The Future of Codification', ibid. 12 (1931), p. 1.

[2] *Records of the Twelfth Assembly*, Plenary Meetings, p. 135.

[3] *U.N.C.I.O. Documents*, vol. 3, p. 1.

[4] Ibid., p. 622 at p. 623.

[5] Consisting of the Chairman and Rapporteur of Committee II/2 (Bolivia and the Dominican Republic), and the representatives of Australia, Belgium, Mexico, the U.S.S.R. and the United Kingdom.

have been approved by the Security Council? (4) Should it be provided that upon failure of the Security Council to act on such rules within a period specified in the Charter, they should become effective and binding, in the same manner as if they had been approved by the Security Council?[1] At its 10th meeting on 21 May Committee II/2 gave limited replies to this questionnaire, answering the first two questions in the affirmative, and the latter two in the negative.[2] On that basis the matter was referred to Sub-committee II/2/B for drafting.[3] Discussion in this Sub-committee centred on the implications of the concept of 'revision' mentioned in question (2). The issue was whether the term 'revision' was comprehended within the term 'development', and the Sub-committee submitted two alternative recommendations. The first, supported by the majority, would have empowered the General Assembly to take action 'for the codification of international law, the encouragement of its development and the promotion of its revision'; the minority proposal would have referred simply to 'encouragement of the progressive development of international law and . . . its codification'. The Sub-committee's report stresses that the expression 'progressive development' in the second alternative covered the question of revision.[4] The debate was resumed at the 21st meeting of Committee II/2, when the second alternative received the majority.[5] This provision ultimately appeared in Article 13 (1) (*a*) of the Charter, as follows: 'The General Assembly shall initiate studies and make recommendations for the purpose of: (*a*) . . . encouraging the progressive development of international law and its codification.'

The Secretariat of the United Nations, in 1946, saw as significant in the San Francisco discussions that it was not the intention of the draftsmen of that provision to limit the functions of the General Assembly to the encouragement of codification alone, but specifically to stress the necessity for encouraging the progressive development of the law—a term which was found to strike a nice balance between stability and change. The point was made that the San Francisco Conference did not wish the new organization 'merely to pick up the threads of international action where the

[1] *Second Report* of Sub-committee II/2/A, 18 May 1945, *U.N.C.I.O.*, vol. 9, p. 346.

[2] Ibid., p. 69.

[3] Composed as Sub-committee II/2/A, with the addition of the U.S.A.

[4] *Third Report* of Sub-committee II/2/B, *U.N.C.I.O.*, vol. 9, p. 419. It is not quite clear what is meant by the 'revision' of international law. The term 'revision' smacks of the techniques of domestic legislation. The only known method of revising international law, in the sense of a deliberate attempt to change an existing rule, whether conventional or customary, is by treaty. For a recent example, cf. Article 11 of the 1958 Convention on the High Seas which deliberately set out to revise the law relating to jurisdiction over ships in collision on the high seas, as laid down by the Permanent Court of International Justice in the *Lotus* case.

[5] Op. cit., p. 177. Note that Committee II/3 also considered this aspect; see the Committee's *Report*, ibid., vol. 10, p. 282. On the other hand, Committee IV/2 postponed consideration of the question, and submitted no recommendation, upon advice that the question of the development of international law was under consideration by another Committee. Ibid., vol. 13, p. 705.

League of Nations had left off. Rather it was hoped that, with the new powers vested in the Organization, a fresh and bolder approach could be made which would stress the progressive development of the law and its codification.'[1] At the same time it is clear that, without affecting this fresh and bolder approach to the substance, there was no disposition to extend it to the procedure of codification leading to any serious breach with the traditional law-declaring techniques of international law. This is the significance of the negative answers returned to the third and fourth questions posed by Sub-committee II/2/A.

While it may be asserted that Article 13 (1) (*a*) does not give rise to serious problems of interpretation, nevertheless, it seems clear that the *travaux préparatoires* of the Charter throw little light on what was really intended by the expressions 'progressive development' and 'codification' of international law, beyond establishing in somewhat vague terms that the concept of progressive development is broad enough to cover the idea of revision. In fact, these terms have always given rise to considerable doctrinal controversy due to the different approaches to the problem adopted by the various legal systems of the world but, as will be seen later, practical solutions to that problem have been found by the International Law Commission. The significance of the formulation of Article 13 (1) (*a*) lies in a different direction. The very idea of specifically mentioning the progressive development and codification of international law in the constituent instrument of the most comprehensive international political organization is revolutionary, and stresses the *political* intent of the organized international community in what had hitherto been commonly regarded as little more than the special preserve of lawyers.[2] Furthermore, the very order in which the two concepts are stated is a clear indication that the emphasis is placed on progressive development rather than on the more static concept of codification. The founders of the United Nations seem to have been aware that after the cataclysm of the twentieth century, what would be needed

[1] Memorandum of the Secretariat, doc. A/122, *General Assembly, Official Records*, Second Part of First Session (1946), Sixth Committee, p. 227 at p. 232. The necessity for a fresh approach to the question was also stressed in contemporary literature. See, for instance, the important article of Sir Cecil Hurst, 'A Plea for the Codification of International Law on New Lines', in *Transactions of the Grotius Society*, 32 (1946), p. 135, and the more radical approach of Alvarez, 'Méthodes de la Codification du Droit International Public', in *Annuaire de l'Institut de Droit International*, 41 (1947), p. 38. And see the Resolution adopted by the Institute on 12 August 1947 (ibid., p. 261), discarding, for the time being, the international convention as an appropriate instrument of codification.

[2] Cf. Alvarez, *Le Droit International Nouveau* (1959), p. 513. Similar mention has since been inserted in Article 67 of the Charter of the Organization of American States (1948); one of the functions of the Inter-American Council of Jurists, which is an organ of the Council of the O.A.S., is to promote the development and codification of public and private international law.

The view has been expressed that there is nothing novel in Article 13 (1) (*a*). Jennings, 'The Progressive Development of International Law and its Codification', in this *Year Book*, 24 (1947), at p. 301. It is submitted, with respect, that this view fails to give sufficient weight to the political, as opposed to the technical, implications of the inclusion of this provision in the Charter.

would be the complete remodelling of the classic notions of customary international law.[1] On the other hand, it is doubtful if they were or could have been aware, in 1945, of the powerful forces which were, in the next fifteen years, to mass themselves against traditional notions of customary international law and its principles.

The story which follows relates to the manner in which those new forces, which have done so much to mould the character of the international community of our day, are applying themselves also to the progressive development and codification of international law. In this story a decisive caesura takes place in the year 1955 following the break in the deadlock over the admission of new members into the United Nations. Until that event the United Nations, and all its organs including the International Law Commission, reflected the political relationships existing in 1945. Thereafter the complexion of the United Nations, and that of its organs, has been brought more into line with the new pattern of political relationships.

3. *The Committee on the Progressive Development of International Law and its Codification (1947)*

The novel character of Article 13 (1) (*a*) of the Charter, and the impact of the new forces which were to condition the fresh approach to the whole question of codification, soon came to the fore when the General Assembly started to examine how it would discharge the responsibilities now placed upon it.

This phase commenced at the Second Part of the First Session (1946), the agenda of which contained the following item, proposed by the Secretary-General: Carrying out of the provisions of Article 13 of the Charter regarding the progressive development of international law and its codification. A proposal by the Secretariat that the matter should initially be referred to a Sub-committee[2] was deferred pending a general examination by the Sixth Committee,[3] although the Sub-committee itself was formed immediately.[4] However, two weeks later the Sixth Committee

[1] That Article 13 (1) (*a*) refers primarily to customary international law may also be inferred from the fact that other provisions of the Charter, notably Articles 13 (1) (*b*) and chapters ix and x, contain other provisions which enable the United Nations to sponsor the creation of new rules of law, particularly, though not exclusively, by means of new conventions. Cf. Article 62.

The first four issues of the *Annual Report of the Secretary-General on the Work of the Organization* (A/65, A/315, A/565, A/930, 1946–9) each contain, under the general rubric of the development and codification of international law, a section on international legislation under the auspices of the United Nations. But since 1950 this section has been moved to the general rubric dealing with multilateral conventions.

[2] Doc. A/C.6/W.2.

[3] 14th meeting, 5 November 1946.

[4] 15th meeting, 6 November 1946. The Sub-committee consisted of Belgium, Canada, China, Cuba, Czechoslovakia, Egypt, Norway, U.S.S.R., United Kingdom and U.S.A.

referred the question to the Sub-committee without any debate,[1] and on receipt of the Sub-committee's Draft Report[2] the Committee merely held a brief debate in which it slightly amended and adopted the Report.[3] At its 55th meeting on 11 December 1946 the General Assembly adopted, as Resolution 94 (I), the draft thus submitted to it, after a brief debate at which a further amendment was accepted.

The sketchy discussions throw little light on the problems which arose, but having regard to the character of the first session of the General Assembly, which was largely concerned with questions of organization and preparation for future substantive activities, it may be surmised that there was general agreement to postpone any substantive discussion until later, and in the meantime to let smaller groups undertake the spadework. This indeed appears clearly in the draft Report prepared by the Sub-committee and later submitted to the General Assembly, which made the following points: (*a*) it was desirable to establish a Committee to study and report on the methods which the General Assembly might suitably adopt in implementation of the 'obligation' imposed on it by the Charter; (*b*) a considered and comprehensive report should be available to the General Assembly before it formulated any definite plan for the progressive development of international law and its codification; (*c*) a study of existing projects and of the methods followed by official and unofficial bodies engaged in promoting the development and formulation of public and private international law was necessary to the work of the proposed Committee; (*d*) in view of the difficulties encountered in the past, the Committee should consider the possibility of recommending a fresh approach to the problem; (*e*) the Committee should be composed exclusively of 'governmental representatives of Members of the United Nations'. As to the composition of the Committee, the Sub-committee recommended fourteen members, a number that was 'neither so large as to impair the efficiency of the proposed Committee, nor so small as to prevent the principal legal systems of the world from being represented'; and it was further proposed that the members should be appointed by the General Assembly on the recommendation of its President, 'every effort [being] made to have the Committee genuinely representative of the main forms of civilization and of the principal legal systems of the world'.[4] In the subsequent discussions in the Sixth Committee and the Plenary, the membership of the Committee

[1] 21st meeting, 20 November 1946. For documentation, which consisted of a basic memorandum prepared by the Secretariat (A/122 and Add.1), and draft resolutions and proposals by the U.S.A. and China (A/C.6/54) and Argentina (A/C.6/72), see *General Assembly, Official Records*, Second Part of First Session (1946), Sixth Committee, pp. 227–38.

[2] A/C.6/114, loc. cit., p. 239.

[3] 31st meeting, 6 December 1946.

[4] A/C.6/114 (cited). The Report of the Sixth Committee itself appears in doc. A/222, and was reissued as doc. A/AC.10/2.

was increased to seventeen; otherwise the Sub-committee's report and draft resolution were adopted.

Resolution 94 (I), in which the principal terms of reference of the new Committee were laid down, retains the theme of the Sub-committee's Report about the 'obligation' laid upon the General Assembly by Article 13 (1) (*a*) of the Charter. The Committee was directed to report to the next regular session on three aspects: (*a*) methods by which the General Assembly should encourage the progressive development of international law and its *eventual* codification; (*b*) methods of securing the co-operation of the several organs of the United Nations to this end; (*c*) methods of enlisting the assistance of such national or international bodies as might aid in the attainment of the objective. Furthermore, the Secretariat was instructed to provide such assistance as the Committee might require for its work.

Thus was born the Committee for the Progressive Development of International Law and its Codification, sometimes known as the Committee of Seventeen.

This was not the only task assigned to that Committee by the General Assembly in 1946. By Resolution 38 (I) of 11 December 1946, adopted on the recommendation of the First Committee, the new Committee was requested to report on the Draft Declaration on the Rights and Duties of States; and by Resolution 95 (I) of the same date, adopted on the recommendation of the Sixth Committee, the new Committee was directed 'to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of that Tribunal'. Furthermore, the Economic and Social Council, by its Resolution 47 (IV) adopted on 28 March 1947, requested the Secretary-General to consult with the new Committee regarding the preparation of a draft convention on the crime of genocide. These additional assignments are of some significance in several respects. In the first place they conferred upon the Committee functions different in kind from those contemplated in Resolution 94 (I), which were strictly limited to the mechanics of progressive development and codification. Secondly, they illustrate a somewhat broad approach to the substantive context of the work, which was not restricted to matters comprised within the scope of classic international law. Thirdly, it may be noted that the initiative for the additional assignments was not limited either to the Sixth Committee, or even to the General Assembly. These three features were to reappear later, after the International Law Commission was established, and it is believed that they caused some interference in the fulfilment of the Commission's primary task.

The Committee, which was in session at New York from 12 May to 17 June 1947, was composed of the following: Ferrer (Argentina), Wynes (Australia), Amado (Brazil), Shu-hsi Hsu (China), Rocha (Colombia), Rafaat (Egypt), Donnedieu de Varbres and Beaulieu (alternate) (France), Sir Dalip Singh (India), de Beus (Netherlands), de la Guardia (Panama), Grzybowski, with Rudzinski and Bramson as alternates (Poland), Sjoborg with Petrén as alternate (Sweden), Koretsky (U.S.S.R.), Brierly (United Kingdom), Jessup (U.S.A.), Stolk with Zuloaga as alternate (Venezuela) and Bartoš (Yugoslavia). Sir Dalip Singh was elected Chairman and Brierly Rapporteur. At the conclusion of its work it submitted reports on the 'Methods for Encouraging the Progressive Development of International Law and its Eventual Codification',[1] on plans for the formulation of the principles of the Nuremberg Charter and Judgment[2] and on the Draft Declaration of the Rights and Duties of States.[3] With regard to the Convention on Genocide, the Committee expressed no opinion since it had no information as to the views of Governments.[4]

The Committee was furnished with copious—and highly valuable—documentation prepared by the Secretariat which included, besides the memoranda cited on pp. 106 and 107 above, an important memorandum on methods for encouraging the progressive development of international law and its eventual codification, in which the Secretariat set forth its own views on the topic,[5] another memorandum on methods for enlisting the co-operation of other bodies, national and international, concerned with international law,[6] and material relating to the special assignments conferred on the Committee. In addition, individual members of the Committee submitted a series of memoranda, both on the general question and on individual aspects, and these are of importance as indicating how their Governments envisaged, at the time, the implementation of the Charter

[1] A/AC.10/51, also A/331 in *General Assembly, Official Records*, Second Session (1947), Sixth Committee, p. 173.

[2] A/AC.10/52, also A/332, loc. cit., p. 211. It recommended that the question should be entrusted to the International Law Commission.

[3] A/AC.10/53, A/333, loc. cit., p. 345. The Committee made a similar recommendation.

[4] A/AC.10/55. For the Report to the Economic and Social Council, see doc. E/447.

[5] A/AC.10/7, 6 May 1947. Among the methods suggested by the Secretariat were: extension of the area of matters covered by 'international legislation'; compilation of international legislative materials (including classified subject indexes of the contents of multilateral instruments, multilingual glossaries, &c.); improvement in techniques of multipartite instruments such as the adoption of uniform treaty clauses, encouragement of ratifications and accessions; encouragement of the use of U.N. organs in the conclusion of multipartite instruments; encouraging the development of customary law by making the evidence of State practice more accessible; and the publication of judicial decisions. With regard to the codification of the law, as opposed to its progressive development, the memorandum discussed the respective advantages and disadvantages of what it termed 'international conventions as a method' and 'restatements of international law as a method'. Many of the suggestions of this memorandum have since been put into effect, and where they have not, such as in the matter of the techniques of treaty drafting, there is reason to believe that the work of codification has as a whole suffered.

[6] A/AC.10/22, 16 May 1947.

provision.[1] The political attitudes which appear in those memoranda later reappeared both in the International Law Commission, and in the Sixth Committee. These statements bring out several important features. For instance, the delegate of Brazil used forthright language to illustrate the political implications of the endeavour: 'The work of codification, like that of the development of international law, must be carried out in co-operation with the political authorities of States. This does not mean that the jurists should solve problems of a political nature, but that they are obliged to take them into account in order that their work may be effective; they must see whether their efforts have any prospect of practical success.' He wanted the collaboration between the International Law Commission[2] and Governments to assume what he called 'a routine and frequent nature'. The United States proposed a comprehensive plan which envisaged both the preparation of drafts and the restatement of existing rules and principles of international law subject always to ultimate control by the General Assembly. The United Kingdom, attracted by the reference in General Assembly Resolution 94 (I) to 'a fresh approach', and perhaps influenced by what is sometimes regarded as a traditional mistrust of codification held by British lawyers, thought in terms of codification essentially by means of scientific, depoliticized, restatement; these should be kept distinct from conventions, the object of which is to state rules which are acceptable to the parties. On the other hand, the representative of Poland placed the emphasis on progressive development of the law, while the Soviet representative insisted that the convention method was the only practical way of dealing both with the codification and with the progressive development of the law.

The final report of the Committee shows that despite fundamental divergences in the points of departure, a remarkable degree of unanimity was attained on most aspects, though the compromise character of some of its proposals merely left decisions and definitions to empiric developments.

[1] See the Memoranda, speeches and proposals by the representatives of Argentina (A/AC.10/10, 13 May 1947), Brazil (A/AC.10/28, 19 May 1947), China (A/AC.10/31, 20 May 1947), Netherlands (A/AC.10/18, 14 May 1947, A/AC.10/23, 16 May 1947), Poland (A/AC.10/19, 15 May 1947, A/AC.10/20, 15 May 1947, A/AC.10/37, 2 June 1947), Sweden (A/AC.10/24, 16 May 1947), U.S.S.R. (A/AC.10/32, 23 May 1947), United Kingdom (A/AC.10/16, 12 May 1947, A/AC.10/17, 13 May 1947, A/AC.10/35, 23 May 1947), U.S.A. (A/AC.10/11, 13 May 1947, A/AC.10/14, 12 May 1947). For proposals by the Chairman, see A/AC.10/27, 19 May 1947. For statements and proposals of the Rapporteur, see A/AC.10/26, 16 May 1947, A/AC.10/30, 20 May 1947, A/AC.10/40, 5 June 1947, A/AC.10/43, 6 June 1947, A/AC.10/50, 13 June 1947. The only formal proposal before the Committee was a joint proposal by China and the U.S.A., A/AC.10/33, 23 May 1947. The Summary Records of the Committee are published in docs. A/AC.10/SR. 1 to 30. For disposition of agenda items and check list of documents, see A/AC.10/57, 25 July 1947.

[2] In the early stages, the Committee referred to the *Commission of Jurists*, or the *Commission of Experts on International Law*. The name *International Law Commission* was suggested by Brierly at the 15th meeting of the Committee and adopted without opposition. A/AC.10/SR.15, pp. 14–15, 29 May 1947.

The Committee was unanimous in recommending the establishment of the International Law Commission, consisting of persons of recognized competence in international law, and rejected proposals to establish separate Commissions for public, private and penal international law. However, so as not to interfere with the work of The Hague Conference on Private International Law, the Committee recommended that when dealing with private international law questions, the Commission consult with the Netherlands Government.[1] The Committee proposed fifteen—the same as the number of judges of the International Court—as the ideal membership of the Commission, but was divided on the method of their election. A minority thought in terms of what might be denominated 'apolitical election', to be undertaken by the judges of the International Court of Justice (assuming they would agree to discharge that task). The majority, however, preferred a system of nomination and election of candidates based upon the method prescribed for the judges of the Court. While the election —by the Security Council and the General Assembly—would follow Articles 3 and 8–12 of the Statute of the Court,[2] the system of nomination would differ in that it would consist of direct nomination by Governments, and not of indirect nomination by national groups as is desired for the Court. As for casual vacancies in the Commission, the Committee recommended nomination by the Commission and election by the Security Council, pending the regularization of the election at the next annual session of the General Assembly. The Commission was to be a full-time body, and its members were to receive a salary.

The following paragraphs show how the Committee envisaged the principal task of the International Law Commission, and these passages have significance as being the first—and indeed only—political formulation of the distinction between progressive development and codification:

'7. The Committee recognized that the tasks entrusted by the General Assembly to the commission might vary in their nature. Some of the tasks might involve the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of States. Other tasks might, on the other hand, involve the more precise formulation and systematization of law in areas where there has been extensive State practice, precedent and doctrine. For convenience of reference, the Committee has referred to the first type of task as "progressive development" and to the second type of task as "codification", and it suggests the following procedures which it considers would be appropriate respectively in each of these cases. The Committee recognizes

[1] Note, in this connexion, E.C.O.S.O.C. Resolution 678 (XXVI) of 3 July 1958 regarding co-operation between the United Nations and The Hague Conference on Private International Law and the International Institute for the Unification of Private Law.

[2] See Rosenne, *The International Court of Justice* (1957), pp. 119–29. For these elections an absolute majority in both organs is required, the only instance of this in the Charter which normally requires a simple or a qualified majority. Charter, Articles 18 (General Assembly) and 27 (Security Council).

that the terms employed are not mutually exclusive, as, for example, in cases where the formulation and systematization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by States. . . .

'10. For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments. The Committee by a majority vote, however, agreed that for the purposes of the procedures adopted below, the definition given in paragraph 7 above would be applicable.'[1]

On that basis, the Committee elaborated two distinct sets of procedures, one for progressive development, and one for codification. Common to both procedures was the appointment of a Special Rapporteur for each topic to be treated, the Commission being free to go outside its ranks in the choice of the Special Rapporteur, and an elaborate system of consultation with Governments in various stages of the progress of the work. The principal differences related to the power of initiative and the final consummation of the work on a given topic. For progressive development it was assumed that the initiative would normally come from the General Assembly, although initiative from Governments, other United Nations organs,[2] Specialized Agencies and other inter-governmental organizations was not excluded; and the General Assembly was to decide on the final disposition of the matter. With regard to codification the Committee envisaged that both the General Assembly and the Commission would share the right of initiative. Indeed, it was recommended that the General Assembly should instruct the Commission to survey the whole field of customary international law with a view to selecting topics for codification, and that the General Assembly should itself select topics for codification. As for the final disposition of the items, this would range from a mere report by the Commission to the General Assembly which would itself take no action on it, to the convening of a special conference to consider the conclusion of a convention.[3]

The Committee—on the basis of the Secretariat's memorandum previously cited (A/AC.10/7)—also included general recommendations relating to the techniques of treaty drafting which should be taken up by the

[1] This is now incorporated in Article 15 of the Statute.

[2] However, the Committee unanimously recognized that the Economic and Social Council possessed the right of initiative in proposing conventions. Cf. Charter, Article 62.

[3] These provisions are now substantially incorporated in Articles 16–17 (progressive development) and 18–23 (codification) of the Statute, with the important modification, however, that it is not obligatory for a special rapporteur to be appointed in connexion with a topic selected for codification. But in practice a special rapporteur has always been appointed for these topics. See statements of Sir Gerald Fitzmaurice, as Chairman of the Commission, in the 601st and 610th meetings of the Sixth Committee (1959), *General Assembly, Official Records*, pp. 5 and 50. He also explained why it would not be practicable for the Commission to choose special rapporteurs from outside its own ranks.

Commission,[1] as well as on the question of making the evidences of customary international law more readily available. On the other hand, it left it to the General Assembly to consider the matter of the utility and importance of encouraging the ratification of and accessions to existing conventions.[2] Finally, the Committee made a number of practical suggestions regarding the co-operation of the Commission with other United Nations organs and with other concerned national and international bodies.

The most important omission from this report is of any mention of the manner in which the General Assembly itself might discharge the tasks which would devolve upon it in consequence of the activities of the proposed Commission. The report does not state in as many words that the Commission was to be a subsidiary organ of the General Assembly within the meaning of Article 7 (2) of the Charter, although this was indeed implicit, and is silent on the important question of the frequency at which the Commission was to report to its parent body—if indeed it was to submit regular reports at all. There are no suggestions for the procedure by which the General Assembly should consider the Commission's reports. When this aspect had been discussed in the Committee of Seventeen, some detailed ideas had been formulated, and at the Committee's 13th meeting it was unanimously decided to recommend that the Sixth Committee should not set up a special Sub-committee to examine the drafts and reports emanating from the International Law Commission; but no mention of this appears in the Committee's final report, and the idea seems to have been dropped.[3]

Viewing this document in retrospect, and in the light of eleven years of experience of the workings of the International Law Commission and of

[1] The question of the techniques of treaty-drafting seems to be in a most unsatisfactory state. See Reiff, 'A Form Book for Standard Treaty Clauses', in *American Journal of International Law*, 40 (1946), p. 640; Jenks, 'The Impact of International Organisations on International Law' in *The Common Law of Mankind*, p. 173 at p. 189; and see statement of Mr. Liang, in reply to this writer, at the 572nd meeting of the Sixth Committee, 31 October 1958, *General Assembly, Official Records*, p. 104.

[2] This aspect had, on occasions, been discussed by the Council of the League of Nations and appropriate resolutions adopted. No comprehensive resolutions of comparable scope have been adopted by the General Assembly which has, however, on occasion adopted resolutions referring to specific conventions. See, for instance, Resolution 131 (II) of 17 November 1947 regarding the entry into force of the Constitution of the World Health Organization; Resolution 135 (II) of 17 November 1947 regarding the entry into force of the Protocol of 11 December 1946 on Narcotic Drugs; Resolution 171 (II) of 14 November 1947 on the greater use of the International Court; Resolution 795 (VII) of 3 November 1953 regarding acceleration of ratifications of or accessions to the Genocide Convention; Resolution 928 (X) of 14 December 1955, regarding the Convention relating to the Status of Stateless Persons; &c.

[3] See suggestions of U.S.A. (A/AC.10/14) and the joint proposal of China and the U.S.A. (A/AC.10/33). Among the reasons for this suggestion was anxiety that because of its anticipated enormous agenda the Sixth Committee would not be able to give adequate consideration to the Committee's reports. Subsequent experience has shown this fear to be misplaced. For many years, the annual reports of the International Law Commission have been the most important, and recurrent, item on the agenda of the Sixth Committee.

the Sixth Committee, it would be easy to pick holes in the plan so carefully elaborated by the Committee of Seventeen. Despite the warning contained in paragraph 10 of the report cited on p. 118 above, the Committee does seem to have considered that the terms 'progressive development' and 'codification' could be defined individually, and that if the distinction between them could not always be rigidly maintained, it was none the less fairly clear. It was on that basis that the perhaps over-detailed, differentiated, procedures were established. But any criticism of that nature today would be pettifogging and unfair. With the minimum of guidance from the San Francisco Conference and from the General Assembly, and certainly inspired by the general enthusiasm characteristic of the early years of the United Nations, the work of the Committee on the Progressive Development of International Law and its Codification must be taken for what it is—a milestone in the history of the codification of international law, the first step to place this important process squarely in its proper context combining the requirements of sound learning with the realities of political life, a 'proper and legitimate object of endeavour on the part of the organized international community'.[1]

4. *The Adoption of the Statute of the International Law Commission*

The discussion on the Committee's Report in the Second Session of the General Assembly (1947) was more thoroughgoing than the preliminary discussion of the previous year. The formal initiative was taken by the United States which presented a draft resolution on the establishment of an International Law Commission.[2] After a short debate, the Committee set up a Sub-committee to draft a resolution and report back to the Committee.[3] There was general agreement on the desirability of establishing the International Law Commission along the lines proposed by the Committee of Seventeen, save for the U.S.S.R., which, while not objecting in principle to the creation of a special Commission, yet thought that the Committee of Seventeen should continue its preparatory work, and that the International Law Commission should not be set up in 1947.[4] At the same time criticism was voiced in particular concerning two aspects of the original plan: some delegations felt that only the General Assembly should elect the members of the International Law Commission; and others

[1] Oppenheim's *International Law*, vol. 1 (8th ed., 1955), p. 66.

[2] A/C.6/137, 24 September 1947. *General Assembly, Official Records*, Second Session, Sixth Committee, p. 182. And see A/C.6/138, A/C.6/142, for amendments by the United Kingdom and Canada; and A/C.6/139 for a draft resolution by France. Loc. cit., pp. 184–5.

[3] 37th and 38th meetings, 25 and 26 September 1947. Loc. cit., pp. 4–16. The Sub-committee consisted of Australia, Brazil, China, Colombia, Dominican Republic, France, Greece, Netherlands, Poland, Sweden, U.S.S.R., United Kingdom, U.S.A. and Yugoslavia. This composition is not as a whole representative of the principal legal systems of the world.

[4] Loc. cit., p. 7. And see the formal proposal to that effect, A/C.6/141, loc. cit., p. 386.

preferred the Commission to work on a part-time rather than on a whole-time basis as the Committee of Seventeen had envisaged. Obviously, these two approaches—both of which were ultimately adopted—changed the character of the proposed Commission and its work.

A week later the Sixth Committee received from the Sub-committee an interim report concerning the establishment of the International Law Commission.[1] By 8 votes to 7 the Sub-committee had decided in favour of the election being held in 1947. It also accepted, unanimously, the idea that the Commission should operate on a part-time basis,[2] and adopted fifteen as the membership.[3] The minority in favour of postponing the elections until 1948 was further divided: one group favoured the immediate adoption of the Statute of the Commission, while the second group desired the postponement of that process too. In view of this divergence of views the Sub-committee sought a directive from the Sixth Committee, which decided, by 33 votes to 14, to postpone the first election until 1948, while establishing the text of the Statute forthwith.

The Sub-committee then devoted fifteen meetings to a detailed study of the Report of the Committee of Seventeen, as a result of which that Committee's plan was redrafted as a Statute, the text of which was annexed to a draft Resolution proposed by the Sub-committee for adoption by the General Assembly. The Sub-committee's Report contains a comprehensive account of the various questions discussed, and of the considerations which weighed in the adoption of its decisions.[4] Another Report by the Sub-committee proposed that, in view of the postponement of the election of the International Law Commission until 1948, the Committee of Seventeen should be retained in existence and instructed to suggest questions which might be referred to the Commission when established.[5] These two proposals were examined by the Committee at its 58th and 59th meetings on 20 November 1947.[6] The Statute of the Commission was then adopted by 35 votes to 4 with 1 abstention, but the proposal regarding the continuation of the Committee of Seventeen was rejected by 25 votes to 15. In lieu, the Committee accepted an amended French proposal by which the Secretariat would in the interval before the election of the Commission's members undertake the necessary preparatory work.[7] The draft resolutions proposed

[1] A/C.6/150, loc. cit., p. 187. And see statement of the Rapporteur, Professor François, at the 40th meeting of the Sixth Committee, 2 October 1947, ibid., p. 24.

[2] Two reasons were later given for this: (1) budgetary economy; (2) the difficulty of obtaining outstanding jurists on a full-time basis. Final Report of the Sub-committee, A/C.6/193, loc. cit., p. 188 at p. 189.

[3] Apparently in imitation of the Statute of the Court.

[4] Doc. A/C.6/193, 18 November 1947, loc. cit., at p. 188. Amendments were proposed by France (A/C.6/196, ibid., p. 204) and the U.S.S.R. (A/C.6/199, ibid., p. 205).

[5] Doc. A/C.6/194, 18 November 1947, ibid., p. 206.

[6] Ibid., pp. 147–62.

[7] Doc. A/C.6/196, as amended by the U.S.S.R., A/C.6/200, ibid., p. 209.

by the Sixth Committee were thereupon approved by the General Assembly as Resolutions 174 (II) and 175 (II) of 21 November 1947, on the Establishment of the International Law Commission and on Preparation of its Work by the Secretariat.[1]

Since then, the Statute has been amended several times, partly on the initiative of the Commission, partly on that of individual States.

The text of the Statute, as it now stands, is contained in Appendix I.

5. *The Composition of the Commission* (*Statute, Articles 2–11*)

For the method of nomination and election of the Commission's members, the Sub-committee rejected both the suggestion of the Committee of Seventeen for a system of election analogous to that of the members of the International Court, and the alternative proposal that the election should be conducted by the judges of that Court. Instead, it adopted a more unconcealed political approach by which candidates should be nominated exclusively by Governments Members of the United Nations (Articles 3–5), and the election should be by the General Assembly alone, it being 'the body best qualified to deal with this matter'. In addition, the Sub-committee rejected proposals that the required majority for election should be two-thirds or an absolute majority (half plus one of the total membership of the United Nations) and instead provided for the simple majority of the votes cast (Article 9).[2] This represents the abandonment of objective scientific criteria as the primary consideration in the choice of the individual members of the Commission and the application of more pronounced political criteria—the General Assembly being itself an exclusively political body. Furthermore, Article 8 of the Statute (echoing Article 9 of the Statute of the Court) provides that at the election the electors should bear in mind that the persons elected should individually possess the qualifications required (persons of recognized competence in international law), and that the Commission as a whole should assure the representation of the main forms of civilization and of the principal legal systems of the world.[3]

[1] For the report of the Sixth Committee, see *General Assembly, Official Records*, Second Session, Plenary Meetings, vol. 2, p. 1624 (A/504) and p. 1625 (A/506). For discussion at the 123rd Plenary Meeting, see p. 1272. The Statute was adopted by 44 votes to none, with 6 abstentions.

[2] Cf. Rule 86 of the (current) Rules of Procedure of the General Assembly. Normally, by Rule 94, all elections are by secret ballot without nominations, but this last provision is overridden in the present case by the express terms of the Statute. The Statute contains provisions in Article 2 analogous to those of the Statute of the Court, to prevent the election of two nationals of the same State. This was applied by analogy after the amalgamation of Egypt and Syria to form the United Arab Republic, and led to the resignation of El-Erian. *Tenth Report* (1958), para. 4. For the decision of principle to indicate the nationality of the members of the Commission in the annual reports, see *I.L.C. Yearbook*, 1949, p. 221.

[3] For the original drafting of this formula in the Statute of the Permanent Court of International Justice, see Hudson, *The Permanent Court of International Justice 1920–1942* (1943),

On the other hand, for the filling of casual vacancies, the Sub-committee adopted quite a different approach, by deciding that they should be filled by the Commission itself, which should have due regard to the provisions of Articles 2 and 8 of the Statute (Article 11). This provides the Commission with an opportunity, without ignoring basic political factors, to give equal weight to the professional qualifications of candidates. Some opposition to this system later developed in the General Assembly, which requested the Commission to give its opinion on the matter, but the Commission preferred to leave things as they were.[1]

It will be noted that in fact membership of the Commission has been restricted to nationals of Members of the United Nations, although this is not specifically written into the Statute. The decision to this effect was taken by the Sub-committee on the ostensible ground that since the task of the Commission was primarily to codify the law among Members of the United Nations, it would complicate matters if nationals of non-members, who 'might uphold ideas contrary to the principles and purposes of the United Nations', were to participate in its work on the same footing as the nationals of member States.[2] This seems to be a restriction on the scope of Article 13 (1) (*a*) of the Charter, and demonstrates a philosophical approach which may not be compatible with the controversial Article 2 (6) of the Charter: what is more, there may be an element of spuriousness in that reasoning which is probably connected with the fact that in the first decade of the existence of the United Nations a number of important countries were excluded from its ranks. However, since the solution to the problem of the admission of new members at the end of 1955, this problem has lost any political significance it might once have had.

As in the case of members of the Court, and by the combined effects of Articles 2, 8 and 9 of the Statute, the members of the Commission sit in their individual capacity, and not as representatives of their Governments. The practical significance of this became apparent in 1950 and subsequently

p. 157. For comment on the same provision in the Statute of the present Court, see Rosenne, *The International Court of Justice* (1957), pp. 120–2. This formula was applied to the organs dealing with the codification of international law in the Resolution adopted by the Fifth Assembly of the League of Nations on 22 September 1924. See League of Nations, *Official Journal* (*Special Supplement*, No. 23), pp. 121–5.

[1] General Assembly Resolution 986 (X) of 3 December 1955. For the Opinion of the Commission, see discussion at its 333rd and 336th meetings, and *Eighth Report* (1956), para. 38. *I.L.C. Yearbook*, 1956—I, pp. 2, 11; 1956—II, p. 301.

[2] The Statute empowers the Commission to consult with experts, outside the Secretariat, who need not necessarily be nationals of member States. Articles 16 (*e*) and 21 (1). For instances of consultations with experts, see *Fourth Report* (1952), paras. 32, 34; *Sixth Report* (1954), para. 40; for a technical report of experts, see *I.L.C. Yearbook*, 1953—II, p. 77 (A/CN.4/61/Add.1), Appendix. In no case have the experts been nationals of non-member States. For co-operation with the Harvard Law School on the question of State Responsibility, see *I.L.C. Yearbook*, 1956—I, pp. 228–49, and paras. 13–14 of the *First Report* of the Special Rapporteur (García-Amador), ibid., 1956—II, p. 173 at p. 176 (A/CN.4/96).

in connexion with Soviet objections to the presence of Shu-hsi Hsu on the Commission.[1]

In its original form (Article 10) the Statute provided that the term of office should be for three years (the first election, as stated, taking place in 1948).[2] However, in practice this has proved impracticable and by stages the term of office has been extended to five years.[3] The longer term is undoubtedly beneficial to the progress of the work of the Commission.

Connected with this point is the decision (see p. 121 above) that the members of the Commission should operate only on a part-time basis. Undoubtedly, that decision has considerably retarded the Commission's work, with the result that the General Assembly was led to adopt its Resolution 484 (V) of 12 December 1950 requesting the Commission to review its Statute and make recommendations for its revision. The Commission felt that the first thing to do was to place the Commission on a full-time basis,[4] and requested a decision by the General Assembly on the principle. When the matter was discussed in the Sixth Committee, however, most delegations felt that the time had not yet come for so fundamental a change in the Commission's structure. The Report of the Sixth Committee contains the following passage:

'In their opinion the prevailing political situation was impropitious to rapid progress in international law. Further, they feared that a large increase in the output of the Commission would impose an excessive burden upon governments asked to comment on draft texts and upon the General Assembly which reviewed them. Some thought it not in the interests of the Commission's work that its members should be severed from

[1] *Second Report* (1950), paras. 4–7. And see discussion at the 39th meeting, *I.L.C. Yearbook*, 1950—I, pp. 1–2. At the conclusion of that meeting, Koretsky withdrew and took no further part in that session. Neither he, nor Žourek, attended the Third Session, and in May 1952 Koretsky resigned, his place being taken by Kojevnikov; and both he and Žourek participated in the meetings. Since then, regret at the non-representation of the Chinese People's Republic is occasionally expressed, without formal proposals being made. See, for instance, statement at the 282nd, 383rd, 432nd meetings. At the 479th meeting (1959) Tunkin on these grounds objected unsuccessfully to the election of Hsu as First Vice-Chairman. *I.L.C. Yearbook*, 1959—I, p. 1. On these occasions opportunity was taken to reiterate that the members are elected in their personal capacity.

For somewhat far-reaching deductions from this provision, see Corbett, *Law in Diplomacy* (1959), pp. 107–8.

[2] There is no formal provision regarding the date of the commencement and termination of the term of office. In 1953 the Commission decided that, in accordance with United Nations practice, the term of office of its present members would expire on 31 December 1953. If a special rapporteur is not re-elected on the expiration of his term, he ceases work on 31 December of the year in which his term expires. However, if he is re-elected, he should continue his work unless and until the Commission, as newly constituted, decides otherwise. *Fifth Report* (1953), para. 172. The Commission's Statute contains nothing corresponding to Article 13 (3) of the Statute of the Court.

[3] The General Assembly, in 1950, decided to extend the existing term to five years. Resolution 486 (V) of 12 December 1950. In 1955 the Commission recommended a formal amendment to Article 10, to take effect from 1 January 1957. *Seventh Report* (1955), paras. 27, 28. This was accepted by the General Assembly in Resolution 985 (X) of 3 December 1955. Accordingly, elections have taken place in 1948, 1953 and 1956.

[4] *Third Report* (1951), paras. 60–71. The Commission devoted seven meetings to this question.

their connections with their respective countries by full-time employment abroad, and were of the opinion that such a condition of membership might make it difficult to find suitable candidates for election.'[1]

These are powerful reasons, individually and collectively, and it is not surprising that the General Assembly accordingly decided to take no further action for the time being, until it had acquired further experience of the functioning of the Commission.[2]

In its original form, the Statute, as stated, fixed fifteen as the membership of the Commission. However, by Resolution 1103 (VI) of 18 December 1956 the number was increased to twenty-one, it being explained in the preamble to the Resolution that this decision had been taken having regard to the 'present composition' of the United Nations.

Despite the obvious political undertones which are characteristic of the discussions of these provisions of the Statute, it is significant that as regards the original membership, there exists no disclosed understanding in the political bodies regarding the distribution of seats to 'the principal legal systems' of the world; on the other hand, such an understanding exists in principle regarding the additional seats created in 1956. The Report of the Sixth Committee includes the following statement:

'13. The Chairman stated that there was a "gentlemen's agreement", among delegations representing the main forms of civilization and main legal systems, that the six additional seats on the Commission should be allocated as follows: three to nationals from African and Asian Members of the United Nations; one to a national from Western Europe; one to a national from Eastern Europe; and one, in alternation, to a national from Latin America and a national from the British Commonwealth countries not otherwise included in any recognized regional grouping. It was also understood that the distribution between different forms of civilization and legal systems would be maintained in respect of the existing fifteen seats.'[3]

[1] A/2088. *General Assembly, Official Records*, Sixth Session (1951), Annexes, agenda item 49, p. 18.

[2] Resolution 600 (VI) of 31 January 1952. Subsequently the Commission decided that it would be 'inopportune' to proceed with the review of the Statute requested in Resolution 484 (V). *Fourth Report* (1952), para. 9.

A connected question is that of the emoluments of the members. The original idea that they should be paid an appropriate honorarium was dropped, the Statute limiting itself, in Article 13, with allowing them travel expenses and a *per diem* allowance. For the views of the Commission, see *First Report* (1949), para. 42 and *Second Report* (1950), para. 21. The Commission stressed the sacrifice in income which conscientious work on behalf of the Commission entailed. By Resolution 485 (V) of 12 December 1950 the Statute was amended to grant the members a special allowance at a rate to be determined by the General Assembly, fixed at $35 a day, an amount proposed by the Sixth Committee and adopted over the objections of the Fifth Committee. *General Assembly, Official Records*, Fifth Session (1950), Annexes, agenda item 52, p. 14 (A/1648). When the question of allowances was reopened by the General Assembly in 1957, the Commission repeated with some degree of emphasis the tenor of its remarks of 1949. *Ninth Report* (1957), paras. 30–32. Then the General Assembly approved an honorarium of $2,500 *per annum* to the Chairman and Special Rapporteurs, and $1,000 to the other members of the Commission, dependent upon attendance at the meetings, and subsistence allowance now fixed at $20 *per diem* for meetings held away from Headquarters.

[3] A/3427, *General Assembly, Official Records*, Eleventh Session (1956), Annexes, agenda item 59. Among the questions which arise from this are: On whom is the 'gentlemen's agreement' binding?

It is against this background that the actual composition of the Commission must be considered.

As a result of the elections of 1948, the Commission was composed as follows: Alfaro (Panama), Amado (Brazil), Brierly (United Kingdom), Córdova (Mexico), El-Khoury (Syria), François (Netherlands), Shu-hsi Hsu (China), Hudson (U.S.A.), Koretsky (U.S.S.R.), Rau (India), Sandström (Sweden), Scelle (France), Spiropoulos (Greece), Yepes (Colombia), Žourek (Czechoslovakia). In 1952, Brierly, Koretsky and Rau resigned, being replaced by Lauterpacht, Kojevnikov and Pal, of the same nationality as the resigning members.

As a result of the elections of 1953, the Commission was composed as follows: Amado (Brazil), Córdova (Mexico), El-Khoury (Syria), François (Netherlands), García-Amador (Cuba), Shu-hsi Hsu (China), Krylov (U.S.S.R.), Lauterpacht (United Kingdom), Pal (India), Parker (U.S.A.), Salamanca (Bolivia), Sandström (Sweden), Scelle (France), Spiropoulos (Greece), Žourek (Czechoslovakia). In 1954 Parker resigned and was replaced by Edmonds; in 1955 Córdova and Lauterpacht resigned, and were replaced by Padilla Nervo and Sir Gerald Fitzmaurice respectively, all of the same nationality as the resigning members.

As a result of the elections of 1956, the expanded Commission was composed as follows: Ago (Italy), Amado (Brazil), Bartoš (Yugoslavia), Edmonds (U.S.A.), El-Erian (Egypt), El-Khoury (Syria), Sir Gerald Fitzmaurice (United Kingdom), François (Netherlands), García-Amador (Cuba), Shu-hsi Hsu (China), Khoman (Thailand), Matine-Daftary (Iran), Padilla Nervo (Mexico), Pal (India), Sandström (Sweden), Scelle (France), Spiropoulos (Greece), Tunkin (U.S.S.R.), von Verdross (Austria), Yokota (Japan), Žourek (Czechoslovakia). In 1958 Spiropoulos resigned, and was replaced by Alfaro (Panama). Also El-Erian resigned (see p. 122, n. 2, above), the casual vacancy being filled only in 1959 by the election of Erim (Turkey). In 1960 Alfaro and Khoman resigned, the vacancies being filled by de Aréchaga (Uruguay) and Yasseen (Iraq).

The resignations of Rau, Córdova, Lauterpacht, Spiropoulos and Alfaro were in each case caused by the election of these persons as judges of the International Court.[1] In the case of casual elections occurring in the two

How can such an agreement be compatible with Article 94 of the Rules of Procedure of the General Assembly regarding the secrecy of ballots? In the election, which took place a week later, the gentlemen's agreement was not observed, especially as regards the allocation of places to the South American States. It is understood that this was primarily due to dissensions within the Latin American bloc.

[1] There is nothing in the Commission's Statute to suggest that membership in the Court is incompatible with membership in the Commission, nor is there anything in the Statute of the Court to suggest a similar incompatibility as regards members of the Court. In the days of the League of Nations it was decided that it was not incompatible for members of the Permanent Court to serve on the Committee of Experts for the Progressive Codification of International Law, League of Nations, *Official Journal* (1924), pp. 143, 274. In 1922 the Permanent Court

periods 1948–53 and 1953–6, the Commission always elected a person of the same nationality as the resigning member. In this way, the distribution of seats as determined by the General Assembly in the previous election was not disturbed. However, in the third period, the Commission has not adhered to this practice. In the case of the vacancy created by the resignation of El-Erian it elected a person from the same geographical region; but in the case of the vacancy caused by the resignation of Spiropoulos it elected a person from a different geographical region. The same occurred as regards the filling of the vacancy caused by the resignation of Khoman. Not much is left of the 'gentlemen's agreement' mentioned in the previously cited statement of the Chairman of the Sixth Committee.

The composition of the Commission may be appraised in various tables, in which, for purposes of comparison, corresponding data regarding the composition of the International Court are also given (see Tables I, II, III).

While, owing to the alteration in 1956 of the total composition of the Commission, the basis for assessment of these tables has changed, nevertheless some interesting conclusions can be drawn from them. Firstly: contrary to the experience of the Court, which is witnessing a steady decline in the representation of Europe, and which is no longer predominantly European in its composition, this process is far less in evidence in the Commission, in which the European membership has always been strong, even if disunited. Secondly, whereas the appearance in the Court of judges trained in the common law, in one form or another, has increased owing to the election of Indian or Pakistan judges beside judges from the United Kingdom, United States and either Canada or Australia, in the Commission, apart from those of the United Kingdom and the United States the only common law representative has come from India. Thirdly, noticeable is the great increase, since 1956 especially, in the representation of Islamic law and Asian law in the Commission, without any parallel increase in the Court. Fourthly, the nationals of the permanent members of the Security Council have always been included in both organs. In addition Brazil, Egypt, India, Mexico, United Arab Republic, Uruguay, and Yugoslavia have at one time or another been simultaneously represented on both bodies, although only the United Arab Republic (or one of its constituent elements) has been *continuously* represented on both organs throughout the whole of the period under review.

It may be asked whether the electoral system is adequate to ensure the best composition for the Commission in the light of the responsible tasks

decided in principle that it was not incompatible for judges to take part in international conferences concerned with the development of the law. Series E, No. 1, p. 247. No similar decision appears to have been taken by the present Court.

TABLE I

Distribution of seats by nationality

	Commission	*Court*		*Commission*	*Court*
Argentine	..	1955–	Mexico	1948–	1946–52, 1958–
Australia	..	1958–			
Austria	1956–	..	Netherlands	1948–	..
Belgium	..	1946–52	Norway	..	1946–
Bolivia	1953–6	..	Pakistan	..	1954–
Brazil	1948–	1946–55	Panama	1948–53, 1958–9	1959–
Canada	..	1946–58			
Chile	..	1946–55	Poland	..	1946–
China	1948–	1946–	Syria (*and see* United Arab Republic)	1948–58	..
Colombia	1948–53	..			
Cuba	1953–	..			
Czechoslovakia	1948–	..	Sweden	1948–	..
Egypt (*and see* United Arab Republic)	1956–8	1946–58	Thailand	1956–9	..
			Turkey	1959–	..
			United Arab Republic (*and see* Egypt, Syria)	1958–	1958–
El Salvador	..	1946–58			
France	1948–	1946–			
Greece	1948–57	1958–	United Kingdom	1948–	1946–
India	1948–	1952–3			
Iran	1956–	..	United States	1948–	1946–
Iraq	1960–	..	U.S.S.R.	1948–	1946–
Italy	1956–	..	Uruguay	1960–	1952–
Japan	1956–	..	Yugoslavia	1956–	1946–58

TABLE II

Representation of principal legal systems

	First period		*Second period*		*Third period*	
	Commission (1948)	*Court (1948)*	*Commission (1953)*	*Court (1954)*	*Commission (1956)*	*Court (1958)*
Common law	2	3	2	4	3	4
Roman law (W. Europe)	3	3	3	2	3	2
Roman law (S. America)	4	4	4	4	4	4
Roman law (Balkans)	1	1	1	1	1	1
Germanic law	nil	nil	nil	nil	1	nil
Islamic law	1	1	1	2	3	2
Communist law	2	2	2	2	2	2
Asian law	2	1	2	2	4	1

Note: (*a*) the decentralization of the common law of the British Commonwealth, leading to the election of persons representing more than one legal system, a factor more noticeable in the Court; (*b*) in 1959 the representation in the Commission of the west European and South American branches of Roman law changed to 2 and 5 respectively.

Table III

Representation of continents

	First period		*Second period*		*Third period*	
	Commission (1948)	*Court (1948)*	*Commission (1953)*	*Court (1954)*	*Commission (1956)*	*Court (1958)*
Europe . .	7	7	7	6	10	6
Asia . .	3	1	3	2	6	2
America (N. and S.) .	5	6	5	6	4	5
Africa . .	nil	1	nil	1	1	1
Australia .	nil	nil	nil	nil	nil	1

Note: In 1959 the distribution by continents of the members of the Commission was changed to Europe 9, America 5.

it has to perform. The answer to this question depends upon whether the measuring-rod is legal perfectionism or political realism. The dilemma has been well put by the late Sir Hersch Lauterpacht:

'It may be possible to take account of these two sets of considerations [i.e. the contradiction between Article 2 and Article 8 of the Statute] without doing violence to the letter and spirit of the Statute, but this may not be possible in all cases. Apart from the undeniable necessity of making the codifying body as representative as possible, the nature of the task to be fulfilled by it is not without relevance in this connection. In an organ which is concerned not only with the restatement of existing law but also with its change and development, qualities of statesmanship and experience may legitimately count for no less than expert knowledge.'[1]

The ability of the General Assembly to elect an adequately balanced Commission which is at the same time fully qualified—from the point of view of its representative capacity, diplomatic experience and legal skill—depends first of all upon the supply of duly qualified candidates. Its freedom of choice is further limited not only by the disclosed and undisclosed understandings concerning the regional allocation of seats, but also by other understandings relating to the distribution of positions to individual countries within the different regions. The diplomatic background to the elections—all elections within United Nations organs—is thus extremely complex and delicate at the same time. This must lead to the conclusion that the real responsibility for upholding the comprehensive

[1] Lauterpacht, 'Codification and Development of International Law', in *American Journal of International Law*, 49 (1955), p. 16 at p. 40.

standards of the Commission rests not with the General Assembly itself, whose hands are largely tied, but with the individual Governments, especially with those which nominate candidates with reasonable prospects that their candidates will be elected.[1]

It is tempting to speculate whether, given this complex background, there is any political interrelation between the nomination and election of members of the Commission and the nomination and election of members of the Court (excluding elections to fill occasional vacancies in the Court). In the period under review, elections (of one-third of the members) to the Court took place in 1948, 1951, 1954, 1957, the last election being held in 1960; and elections for the Commission took place in 1948, 1953, 1956, the next election being due in 1961. The two sets of elections coincided in 1948, and under present arrangements will coincide again in 1966. Clearly, the partial elections of the Court must always occur in close proximity to an antecedent or subsequent election of the Commission. Having regard to the intensive diplomatic activity which accompanies all these elections, it would appear plausible to assume that the overall composition of the two major legal organs of the United Nations (between which some interchange of personnel is to be noted, mostly, but not exclusively, in the direction of the transfer of individuals from the Commission to the Court) is at times taken into consideration by Governments in the course of their negotiations and decisions.

If, then, there is room for the view that as a whole the Commission reflects rather closely the political factors at the possible expense of the professional factors, this is not unintentional, nor entirely a cause for dismay, and, moreover, there is no justification for any pessimistic assumption that the two qualities cannot be reconciled. However, it is believed that there *is* room for improvement, and that improvement would not be difficult to obtain should Governments in the preliminary negotiating stages insist upon the maintenance of the individual standards laid down in the Statute. No criticism is implied in stating that the General Assembly is motivated by political considerations in its election: that such was its intention when drafting the Statute is clearly established (see p. 122 above). The General Assembly can only discharge its functions in the light of the objective circumstances facing it at the time. It is the duty of Governments to make those objective conditions the best possible; conversely, the manner in which the Governments discharge that duty is an indication of their own attitude towards the function of diplomatic codification.

[1] Thus, it has authoritatively been stated that 'some governments have not taken very seriously the selection of persons' to serve on the Commission; Jessup, *The Use of International Law* (1959), p. 125.

6. *Meetings and Reports*

There is nothing in the Commission's Statute regulating the number of meetings[1] the Commission should hold each year, but since 1949 it has normally held one session a year, commencing towards the end of April and lasting about ten weeks.[2]

With regard to procedure, it should be noted that the Statute regulates the procedure of codification and progressive development, but not the procedure whereby the Commission conducts its meetings. On this latter aspect, in 1949 the Commission decided, in accordance with Rule 150 of the General Assembly's Rules of Procedure, that the rules regulating the procedure of the Committees of the General Assembly, as well as Rules 38 and 55, should apply to its meetings, and that the Commission should adopt its own rules of procedure when the need arose.[3] No particular rules of procedure have been adopted by the Commission. In 1954 Sir Hersch Lauterpacht gave notice of his intention to raise the question of the Commission's procedure, but following his resignation later in the year the question seems to have been dropped.[4] The Commission elects each year its officers, consisting of the Chairman, first Vice-Chairman, second Vice-Chairman and General Rapporteur.[5] In addition, as stated, it appoints special rapporteurs for individual topics.

[1] In its original form the Statute provided for the Commission to meet in New York (Article 12), but after the Commission had consistently expressed its opposition, the seat was changed to Geneva. See *Fifth Report* (1953), paras. 173–6, *Seventh Report* (1955), para. 25, and Resolution 694 (VII) of 20 December 1952 and Resolution 1202 (XII) of 13 December 1957. The Statute itself was amended by Resolution 984 (X) of 3 December 1955.

[2] *First Report* (1949), para. 40.

[3] Ibid., para. 5.

[4] *I.L.C. Yearbook*, 1954—I, p. 204.

[5] The positions of Chairman, First Vice-Chairman, Second Vice-Chairman and (General) Rapporteur have been filled as follows: 1949, Hudson, Koretsky, Rau, Amado; 1950, Scelle, Sandström, El-Khoury, Alfaro; 1951, Brierly, Hsu, Yepes, Córdova; 1952, Alfaro, François, Amado, Spiropoulos; 1953, François, Amado, Kojevnikov, Lauterpacht; 1954, Sandström, Córdova, Pal, François; 1955, Spiropoulos, Krylov, García-Amador, François; 1956 García-Amador, Žourek, Edmonds, François; 1957, Žourek, Pal, Padilla Nervo, Fitzmaurice; 1958, Pal, Amado, Tunkin, Fitzmaurice; 1959, Fitzmaurice, Hsu, Alfaro, François; 1960, Padilla Nervo, Yokota, Bartoš, Fitzmaurice. The Commission is normally represented at the immediately following session of the General Assembly by its Chairman for the current year, but occasionally another member is designated, and he is customarily entitled to participate in the debate in the Sixth Committee on the Commission's report. It will be noted that in the period 1952–6, when the Commission was closely occupied with the law of the sea, the Special Rapporteur for that topic (François) was always elected as one of the Commission's officers. In 1956 the Commission decided that he should attend the session of the General Assembly. *Eighth Report* (1956), para. 48. François subsequently served as expert to the Secretariat at the two conferences on the Law of the Sea, which he addressed for the purpose of explaining the Commission's draft Articles. See, for instance, the *Official Records* of the 1958 Conference, vol. 3, p. 67; vol. 4, p. 30; &c.

In addition, the Commission now normally appoints a Drafting Committee both for the drafting of texts after the decision on principle has been taken, and for discussion of points of substance which the full Commission has been unable to resolve. See *Tenth Report* (1958), para. 65. And see Žourek's proposals in doc. A/CN.4/76, paras. 24–25. *I.L.C. Yearbook*, 1958—II, p. 76.

Although the Statute contains no provision for the submission of regular reports to the General Assembly, as distinct from specific reports on various phases of its work, the Commission has customarily submitted an annual report to the General Assembly, which has been discussed at the immediately following session. This discussion normally terminates in a substantive resolution, or in a formal resolution taking note of the report, as the circumstances require.

The most important problem in connexion with the reports relates to the statement of dissenting opinions by individual members. In the *First Report* (1949) certain statements of dissent appeared in the body of the report as well as in footnotes, and during the next two years the footnote system was adopted regularly. The question gave rise to difficulties of both a personal and a political character during the preparation of the *Third Report* (1951), when it was decided for the future to permit a member to express his dissent by means of a reference to the summary records.[1] A further discussion took place in 1953 when two proposals were advanced. The first, by Žourek (A/CN.4/L.42), would permit any member to attach his dissenting opinion if the decision of the Commission does not represent the unanimous opinion of the Commission, or on questions of principle; it was rejected. A second, by Lauterpacht (A/CN.4/L.43), would have entitled members to express their dissent in a footnote at a length to be agreed by the President, with appeal to the Bureau. The vote on this proposal was tied, and the 1951 rule was then left undisturbed.[2]

7. *Relations with Other Bodies*

Several articles of the Statute enable the Commission to establish relations with various other bodies, both official and unofficial. Thus Article 17 enables it to 'circulate a questionnaire', in connexion with its work on topics selected for progressive development, *inter alia* to organs of the United Nations, of Specialized Agencies and to 'official bodies established by international agreement to encourage the progressive development of international law and its codification'. Article 25 enables it to consult with any of the organs of the United Nations on any subject which is within

[1] See discussion in 128th meeting, *I.L.C. Yearbook*, 1951—I, pp. 387 et seq.

[2] *Fifth Report* (1953), para. 163. And see the discussion at the Commission's 195th meeting, *I.L.C. Yearbook*, 1953—I, p. 66. A similar discussion took place in 1955, with the same result. *Seventh Report* (1955), paras. 37–38. This question appears to have lost some of its importance following the adoption of Resolution 987 (X) of 3 December 1955, regarding the regular publication of the documents and records of the Commission.

In this connexion it is to be noted—with some regret—that the published volumes do not contain *all* the documents of the Commission. In particular, many of the L documents of the A/CN.4/— series are omitted, as well as papers originally issued as mimeographed Conference Room Papers; and occasional numbered documents of the main A/CN.4/— Series are only issued in mimeographed form. This, together with the absence of *complete* check lists of documents in the annual volumes, is a possible source of confusion.

the competence of that organ.[1] Article 26 confers on the Commission a general power to consult with any international or national organization, official or non-official.

In practice, the only types of relationship hitherto experienced (apart from those with the General Assembly, to be discussed in the next section) are those with the Economic and Social Council, and those with certain regional bodies on the American and Asian continents. There is no instance of the circulation of a questionnaire by the Commission to any other organ, or of any formal consultation by the Commission with any other organization.

(*a*) *Relationship with the Economic and Social Council*

It has already been seen that in the matter of the Genocide Convention the Council took a certain initiative towards the 1947 Committee of Seventeen, which, however, was unable to comply with the request (see p. 114 above), and that in doing so it purported to confer on that body functions different in kind from those it was set up to perform. The lessons of this, in so far as relates to the application of the techniques of codification to the law-creating activities of the Council in the social sphere, may not have been fully appreciated; for the Council's requests to the Commission do not seem to have taken sufficient account of the Commission's own activities. Moreover, the implementation of tasks requested by the Council was further complicated by the unco-ordinated activities of the various functional commissions of the Council itself. For the Council has made two approaches to the International Law Commission, both relating to aspects of the law of nationality, one at the instigation of the Commission on the Status of Women and the other at that of the Social Commission. A formal basis for these approaches can be seen in Article 17 of the Commission's Statute.

The first approach, connected with the nationality of married women,[2] appears in Resolution 304 D (XI) adopted by the Council on 14 July 1950. Here the Council proposed to the Commission to undertake as soon as possible the drafting of a convention embodying the principles recommended by the Commission on the Status of Women. The International Law Commission was in session at the time. Already at its first session in 1949 the Commission had decided to include 'nationality, including

[1] Presumably this excludes the International Court. Article 96 of the Charter and Article 65 of the Statute of the Court regulate the right to request advisory opinions, and the International Law Commission is not so authorized. As for informal consultation with the Court not by way of advisory opinion, apparently the Court is unwilling to depart from the provisions of the Statute. Cf. Rosenne, *The International Court of Justice* (1957), at p. 468.

[2] See *Fourth Report* of the Commission on the Status of Women (1950), E.C.O.S.O.C., *Official Records*, Eleventh Session (1950), Supplement No. 6 (E/1712) para. 37; E.C.O.S.O.C., *Official Records*, Eleventh Session, Annexes, agenda item 20.

statelessness' in the provisional list of topics selected for codification, and this had been subsequently approved by the General Assembly.[1] On receipt of the Economic and Social Council's request the Commission decided to accede to it in connexion with the topic of nationality, including statelessness, and hoped to be able to initiate work in 1951.[2] The topic was not on the agenda of the Commission's 1951 session, and this gave rise to two trends of opinion within the Commission on the Status of Women. One group thought that if the Commission could not complete the work by 1951, some other measures should be taken; while the majority view remained that the Commission was the most appropriate body, and that it should be asked to complete the work in 1952.[3] This was endorsed by the Council in its Resolution 385 F (XIII) of 27 August 1951.

As for the question of statelessness, the Council had, as far back as Resolution 248 B (IX) of 8 August 1949, established an *ad hoc* Committee on Statelessness instructing it, *inter alia*, to consider the desirability of requesting the Commission to study the question of the elimination of statelessness, to which the *ad hoc* Committee replied in the affirmative.[4]. In its Resolution 319 B III (XI) of 11 August 1950, the Council, noting that work on nationality, including statelessness, was contemplated by the Commission, urged it also to prepare instruments on the elimination of statelessness. It is interesting to note that during this discussion the Council rejected a proposal by Mexico requesting the Commission to prepare a general convention on nationality, including measures to eradicate the problem of statelessness, on the ground that this would tie the Commission's hands.[5]

In its third session (1951), the International Law Commission formally initiated work on the comprehensive topic, deciding that both questions referred to it by the Council lay within the framework of nationality, including statelessness.[6] Thus, in effect, the Commission attempted to insist upon a co-ordinated treatment of the subject within its proper juridical framework, in place of the fragmented treatment envisaged not merely by the

[1] *First Report* (1949), para. 16. And see pp. 139 et seq., below.

[2] *Second Report* (1950), paras. 19, 20. And see discussion in *I.L.C. Yearbook*, 1950—I, pp. 247–55. For the formal communication of the Council's resolution, see A/CN.4/33, *I.L.C. Yearbook*, 1950—II, p. 363, and for the Commission's reply to the Council, see E/1786, E.C.O.S.O.C., *Official Records*, Eleventh Session (1950), Annexes, agenda item 20.

[3] *Fifth Report* of the Commission on the Status of Women (1951), E.C.O.S.O.C., *Official Records*, Thirteenth Session (1951), Supplement No. 10, paras. 52–60. And see statement by Kerno in *I.L.C. Yearbook*, 1951—I, p. 19.

[4] E.C.O.S.O.C., *Official Records*, Eleventh Session (1950), Annexes, agenda item 32 (E/1618).

[5] See doc. E/L.95, ibid., and discussion at the Council's 407th meeting on 11 August 1950.

[6] Hudson was appointed Special Rapporteur. On his resignation in 1952 Córdova succeeded him. For the introduction of the statelessness topic on the Commission's agenda, see A/CN.4/47, *I.L.C. Yearbook*, 1951—II, p. 121. For the initial discussion in the Commission's 124th meeting, see *I.L.C. Yearbook*, 1951—I, p. 354; and for the Commission's decision, see *Third Report* (1951), para. 85.

different functional commissions of the Economic and Social Council, which was probably inevitable, but also by the Council itself. It was to transpire, however, that in this laudable effort the Commission was not to succeed.

In its fourth session, then, the Commission had a comprehensive report prepared by its Special Rapporteur.[1] On the question of the nationality of married women, he suggested that the Commission comply with the Council's request. This would have implied that the Commission would draft the convention, embodying the proposed terms, but without expressing its own views on them. It is not surprising that this did not commend itself to the majority which was of the opinion that the specific problem could only be considered in the context and as an integral part of the whole subject. Furthermore, it refused to confine itself to drafting the text of a convention embodying principles which it itself had neither studied nor approved.[2] The International Law Commission was not going to be a rubber-stamp for another body.

As for the question of statelessness, the bodies of the Council dealing with the general aspects continued their work, and in 1954 a Conference of Plenipotentiaries dealt with the question of the status of stateless persons. This left the International Law Commission with the task of preparing draft conventions for the elimination and reduction of future statelessness, a task which it completed in 1954. The General Assembly, by Resolution 896 (IX) of 4 December 1954, decided to refer the draft to a conference of plenipotentiaries as soon as twenty States had expressed a willingness to attend. The Conference did not convene until the spring of 1959; it was unable to complete its work and adjourned *sine die*. (The resumption of this Conference is anticipated in the latter part of 1961.)

In 1954 the Commission decided to 'defer any further consideration of multiple nationality and any other questions relating to nationality'.[3] This is believed to be the only instance of deliberate self-disseising of a topic by the Commission.

[1] *I.L.C. Yearbook*, 1952—II, p. 3 (A/CN.4/50).

[2] *Fourth Report* (1952), para. 30. The General Assembly 'took note' of this in Resolution 683 (VII) of 6 November 1952. The subsequent history of this instrument is instructive. In 1953 the Council approved a decision of the Commission on the Status of Women to prepare the Convention itself, and by Resolution 587 E (XX) of 3 August 1955, after a series of preparatory steps, the Council submitted the draft to the General Assembly, which, in turn, allocated it to the Third Committee. That Committee proceeded to discuss the substantive articles, and referred the formal articles to the Sixth Committee. Here opposition developed, basically on grounds similar to those previously expressed in the International Law Commission. The underlying feeling was that the Sixth Committee could not agree to give its advice on part of a convention, when another Committee was dealing with other articles of the same instrument. Finally, the Sixth Committee requested the Third Committee to formulate its request in more precise terms. Doc. A/C.6/L.377 in *General Assembly, Official Records*, Tenth Session (1955), Annexes, agenda item 63; and see discussion in the 473rd to 477th meetings of the Sixth Committee. In the eleventh session the Third Committee itself completed work on the convention which was adopted by the General Assembly in Resolution 1040 (XI) of 29 January 1957.

[3] *Sixth Report* (1954), para. 39.

(b) Relationship with Inter-American Bodies[1]

Article 26 (4) of the Statute specifically recognizes the 'advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan-American Union'.[2] The implementation of this has not really given rise to difficulty. However, it was not until 1954, after preparatory action by the Inter-American Council of Jurists and the tenth Inter-American Conference, that the Commission requested the Secretary-General to take appropriate steps to establish closer co-operation between the Commission and these bodies.[3] This was carried a step forward in 1955 when the Commission requested its Secretary to attend the 1956 meeting of the Council of Jurists and to report to the Commission 'concerning such matters discussed by the Council as are also on the agenda of the Commission'.[4] At the same time it expressed the hope that the Council would be able to reciprocate. In 1956 a representative of the Secretary-General of the Organization of American States accordingly attended the Commission's eighth session, and subsequently the Commission decided that its secretary should attend the next meeting of the Council of Jurists, which he did.[5]

(c) Asian-African Legal Consultative Committee

While the Inter-American Council of Jurists is a component part of a comprehensive regional organization—the Organization of American States—the Asian-African Legal Consultative Committee (formerly the Asian Legal Consultative Committee) is of a somewhat different character. This Committee, with purely advisory functions, was established by a number of Asian Governments in 1956, and has since held three sessions at which it has discussed a number of topics. One of its functions indeed is to 'examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission'.[6] Accordingly, the Committee has

[1] It may be noted that by Resolution 253 (III) of 16 October 1948 the General Assembly invited the Secretary-General of the O.A.S. to be present as an observer at the sessions of the General Assembly.

[2] Replaced by the Inter-American Council of Jurists, established by virtue of Article 57 and following of the Constitution of the Organization of American States. See Baez, *El Consejo Interamericano de Jurisconsultos* (1954).

[3] *Sixth Report* (1954), para. 77.

[4] *Seventh Report* (1955), para. 36. For the Secretary's report on that session of the Council of Jurists, see A/CN.4/102, *I.L.C. Yearbook*, 1956—II, p. 236.

[5] *Eighth Report* (1956), paras. 46–47. The Council's meeting, originally scheduled for 1958, took place only in 1959. For the Secretary's Report, see A/CN.4/124, to be published in *I.L.C. Yearbook*, 1960—II. By Resolution XVI of 8 September 1959 the Council requested the Council of the Organization of American States to investigate the possibility that one of the members of the Inter-American Juridical Committee (as opposed to a member of the Secretariat) would attend as observer the sessions of the International Law Commission.

[6] *Ninth Report* (1957), para. 23.

taken certain steps in order to place its relations with the Commission on some sort of formal basis. Thus, in 1957 it requested co-operation with the Commission which itself decided to place the Committee on the list of organizations which receive the Commission's documents, and expressed its willingness to receive any observations which the Committee might wish to make on questions under study by the Commission.[1] In 1958 the Commission was informed that the second session of the Committee was to be held in July of that year, and decided that because of the closeness of that date it was unable to consider the question of sending an observer, as the Committee apparently desired. At the same time the Commission reiterated its interest in the work of the Committee, and asked to receive its documentation relating to matters falling within the scope of the Commission's work.[2] In 1959 certain information was transmitted to the Commission which was again invited to send an observer to a session to be held in November of that year. The Commission replied that the Committee's report on diplomatic intercourse and immunities might be useful to the delegations at the Fourteenth Session of the General Assembly, but that it was too late to make arrangements to send an observer to the November meeting.[3] At its 1960 session the Commission was invited to send an observer to the fourth session of the Committee, to be held in 1961, at which the subject of State responsibility would be discussed. Advancing somewhat beyond its practice in relation to the Inter-American Council of Jurists, the Commission decided to send, as observer, its Special Rapporteur on that topic.[4]

8. *The Implementation of the Commission's Task and its Relations with the Sixth Committee*

It has already been seen (p. 117 above) that in the course of the preparation of the Statute, Article 13 (1) (*a*) of the Charter was interpreted as conferring two distinct tasks on the Commission, namely, the codification and the progressive development (including revision) of international law. The definition of these tasks, as well as certain formal differences of procedure,

[1] *Ninth Report* (1957), para. 24. And see brief discussion in *I.L.C. Yearbook*, 1957—I, p. 172.

[2] *Tenth Report* (1958), para. 73. And see discussion in *I.L.C. Yearbook*, 1958—I, pp. 33, 200–1.

[3] *Eleventh Report* (1959), para. 46. And see discussion in *I.L.C. Yearbook*, 1959—I, p. 161.

[4] *Twelfth Report* (1960), para. 43. At time of writing, the summary records of the Commission's 1960 session are not available, and it is not clear what considerations prompted the Commission to take a step *vis-à-vis* the Afro-Asian Committee—the dispatch of one of its members as observer —which is only under preliminary examination as regards the Inter-American Council.

It may be observed that no material relating to the Afro-Asian Committee is included in the A/CN.4/— documentation. This stands in contrast to the several reports regarding various sessions of the Inter-American Council. In 1960 the Commission asked the Secretariat to ensure, as far as possible, that members were supplied with the documents 'of those inter-governmental organizations with which it was in consultative relationship'. *Twelfth Report* (1960), para. 45.

appear in Articles 15–23 of the Statute substantially in the form proposed by the Committee of Seventeen. The significant questions which have arisen in this phase all relate to the relations between the Commission and its parent body, the General Assembly (Sixth Committee) and the Governments represented on it. These questions may be classified as follows: (*a*) the power of initiative in relation to projects; (*b*) the practical significance of the distinction between codification and progressive development; (*c*) the relations between the Commission and Governments—individually and collectively (through the General Assembly)—in the course of work on a given project; (*d*) the disposal of completed projects. These will now be examined separately.

(*a*) *The power of initiative*

There is no doubt that the Commission has no power itself to initiate a project of progressive development. Articles 16 and 17 of the Statute clearly limit this to the General Assembly and other intergovernmental official organs and agencies, including the Economic and Social Council. On the other hand, Article 18 is interpreted as authorizing the Commission to initiate projects of codification, while requiring it to give priority to requests of the General Assembly. This does not mean that in the course of work of codification the Commission may not introduce elements of progressive development. The true implication of Article 18 seems to be that regard must be had to the anticipated general nature of the work as a whole, and it can be assumed that, if this anticipated character relates to the reformation and systematization of law in areas governed by existing customary law, this fact will, prima facie, be indicative that the project is one of codification. The above interpretation of Article 18 of the Statute was not reached without controversy.[1] Underlying this controversy is a point of more general significance. The political concept of progressive development—and regardless of its doctrinal definition—is that political factors shall determine when a project of progressive development should be undertaken, with the necessary implication that the consummation of the work can only be achieved by international agreement. According to the political concept progressive development implies a deliberate decision to undertake the creation of new rules of law, whether the regulation of a

[1] *Repertory of Practice of United Nations Organs* (1955), vol. 1, p. 416. The Commission adopted this interpretation by 10 votes to 3. *First Report* (1949), paras. 9–12. It was then upheld by the Sixth Committee by 21 votes to 9, with 16 abstentions. That Committee's formal decision was that it was not necessary for the General Assembly to approve the topics recommended by the Commission for codification in order to enable the Commission to carry on its work in the field of selected topics. See discussion in the 158th to 164th meetings, and Resolution 373 (IV) of 6 December 1949 approving the Commission's *First Report*. In fact, the Commission's recommendations are always included in its reports, and thus formally passed upon, in one form or another, by the General Assembly.

topic *de novo*, or a comprehensive (as opposed to incidental)[1] revision of existing rules. This is not, however, the concept of codification pure and simple, which seems to lack this element of deliberation in the creation of something new, and is primarily concerned with the formulation of existing law—and as we have seen, of existing customary law.

The political character of progressive development is, it is submitted, adequately demonstrated by the manner in which the Commission approached this question and arrived at the interpretation of the Statute already mentioned. At its first session, and on the basis of General Assembly Resolution 175 (II) of 21 November 1947 regarding the undertaking of certain preparatory work by the Secretary-General, the Commission examined an important memorandum submitted by the Secretary-General entitled *Survey of International Law in relation to the Work of Codification of the International Law Commission*.[2] As a result of that examination, it drew up a provisional list of fourteen topics selected for codification, as follows: (1) Recognition of States and Governments; (2) Succession of States and Governments; (3) Jurisdictional immunities of States and their property; (4) Jurisdiction with regard to crimes committed outside national territory; (5) Régime of the high seas; (6) Régime of territorial waters; (7) Nationality, including statelessness; (8) Treatment of aliens; (9) Right of asylum; (10) Law of treaties; (11) Diplomatic intercourse and immunities; (12) Consular intercourse and immunities; (13) State responsibility; (14) Arbitral procedure. It thereupon decided to give priority to three topics, for each of which special rapporteurs were elected, namely, the law of treaties,[3] arbitral procedure[4] and the régime of the high seas.[5] In 1949 the General Assembly recommended that the régime of territorial waters be included in the list of topics to be given priority, on the ground that it was 'impossible to deal with the régime of the high seas without at the same time studying the question of territorial waters'.[6] This was a significant move by the General Assembly in the sphere of the law of the sea, and it was followed by others which also should be noted. Thus, by Resolution 798 (VIII) of 7 December 1953 the General Assembly had

[1] Because incidental revision may emerge from a project of codification.

[2] Subsequently published as doc. A/CN.4/1/Rev.1. And see review of this, and of other preparatory work, by H. L[auterpacht] in this *Year Book*, 26 (1949), p. 530.

[3] Brierly was appointed Special Rapporteur. He was replaced by Lauterpacht in 1952, and then by Sir Gerald Fitzmaurice in 1955.

[4] Scelle was appointed Special Rapporteur.

[5] François was appointed Special Rapporteur.

[6] Resolution 374 (IV) of 6 December 1949, on the initiative of Iceland. See *General Assembly, Official Records*, Fourth Session (1949), Sixth Committee, at p. 134. The Commission thereupon included the topic in its priority list. *Second Report* (1950), para. 18. However, it was not until the next year that François was appointed Special Rapporteur also for this topic. *Third Report* (1951), para. 86. And see discussion at the Commission's 125th meeting *I.L.C. Yearbook*, 1950—I, p. 366.

regard to the physical, as well as the juridical, linking of the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters, and decided not to deal with any aspect of the régime of the high seas or of the régime of territorial waters until all the problems involved had been studied by the Commission and reported by it to the General Assembly. It reiterated this stress upon the substantive unity of the theme a year later, in Resolution 899 (IX) of 14 December 1954, and consummated this approach in Resolution 1105 (XI) of 21 February 1957 by which it decided to convene the 1958 Conference on the Law of the Sea, with results which are well known. Subsequently, the Commission acknowledged that the various sections of the law of the sea 'hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside'.[1] There can be little doubt that the General Assembly displayed great practical wisdom in its insistence upon this comprehensive treatment of the vast topic of the law of the sea.

Since then, the General Assembly has asked for treatment to be given to other topics on the provisional list, sometimes with, and sometimes without, calling for priority. In 1952, on the initiative of Yugoslavia (which was at that time involved in political controversy with the U.S.S.R.), it picked out the topic of diplomatic intercourse and immunities for priority treatment;[2] in 1953, on the initiative of Cuba, it requested the Commission to undertake the codification of the principles of international law governing state responsibility, as soon as it considered advisable (i.e. without priority);[3] in 1959, on the initiative of El Salvador, it requested the Commission to undertake the codification of the principles and rules of international law relating to the right of asylum, again without calling for priority;[4] in the same year it decided that the Secretariat should undertake

[1] *Eighth Report* (1956), para. 29.

[2] Resolution 685 (VII) of 5 December 1952. However, in view of the impending election, the Commission postponed a decision until its Sixth Session (see *Fifth Report* (1953), para. 170), when it decided to initiate work and appointed Judge Sandström as Special Rapporteur.

[3] Resolution 799 (VIII) of 7 December 1953. At its sixth session the Commission took note of the Resolution. *Sixth Report* (1954), para. 74. At its seventh session it decided to initiate work and appointed García-Amador as Special Rapporteur.

[4] Resolution 1400 (XIV) of 21 November 1959. This subject is also under discussion in the Commission on Human Rights. For previous discussion in the International Law Commission on the right of asylum, see *First Report* (1949), para. 23, *Second Report* (1950), para. 12. For summary of previous discussions in the Commission on Human Rights—dealing with the implementation of Article 14 of the Universal Declaration of Human Rights—see that Commission's *Thirteenth Report* (1957), paras. 206–14 (E/2970/Rev. 1), and its *Fifteenth Report* (1959), paras. 52–54 (E/3229). In 1960 the Commission on Human Rights completed the text of a Draft Declaration on the Right of Asylum which, by E.C.O.S.O.C. Resolution 772 E (XXX) of 25 July 1960, was transmitted to the General Assembly. At its Fifteenth Session (1960) the General Assembly referred this text not to the Sixth Committee but to the Third Committee which, however, postponed substantive action until 1961. On the other hand, in 1960 the International Law Commission decided to defer its own work on the topic to a future session. *Twelfth Report* (1960), para. 39.

some preliminary surveys of the legal problems relating to the utilization and use of international rivers, as a preliminary to a determination whether the subject is appropriate for codification;[1] it also requested the Commission to undertake in due course 'the study' of the question of the juridical régime of historic waters, including historic bays—a matter arising out of a resolution adopted by the 1958 Conference on the Law of the Sea.[2] On the other hand, the Commission itself has only once, since 1949, on its own initiative undertaken work on a topic included in its provisional list. That was in 1955, when the Commission decided to begin the study of consular intercourse and immunities.[3]

By the end of 1959, then, work had been initiated on nine out of the fourteen topics included on the original provisional list; of these, four had been undertaken by the Commission on its own initiative,[4] one had been undertaken by the Commission on its own initiative after two subdivisions of the question had been referred to it by the Economic and Social Council,[5] and four had been referred to it by the General Assembly,[6] always on the deliberate initiative of single States which presumably had political objectives in view. On the other hand, no question has yet been selected for codification, as such, which was not included on the Commission's provisional list.[7]

The initiative of the General Assembly regarding the treatment of a number of questions which were not included in the provisional list may, therefore, be regarded prima facie as instances in which the General Assembly decided to initiate projects without any clear definition of whether they were being selected for progressive development or codification, or a mixture of both. These include the following: Formulation of the Nuremberg principles;[8] Draft code of offences against the peace and security of mankind[9] (with which the question of the definition of aggression was later included); International criminal jurisdiction;[10] Draft

[1] Resolution 1401 (XIV) of 21 November 1959. No time was specified for the circulation of the Secretary-General's report.

[2] Resolution 1453 (XIV) of 7 December 1959.

[3] *Seventh Report* (1955), para. 31. Žourek was appointed Special Rapporteur.

[4] Régime of the high seas, law of treaties, arbitral procedure, consular intercourse and immunities.

[5] Nationality, including statelessness.

[6] Régime of territorial waters, diplomatic intercourse and immunities, right of asylum, state responsibility.

[7] The request to the Commission to 'study' the question of historic waters, as the request the year before (in Resolution 1289 (XIII) of 5 December 1958) to give further consideration to the question of relations between States and inter-governmental organizations, ought not to be equated with definite requests to the Commission to initiate work of codification. This is so even though they arose out of antecedent consideration of topics included in the provisional list for codification.

[8] Resolution 177 (II) of 21 November 1947. Spiropoulos was appointed Special Rapporteur.

[9] Also by Resolution 177 (II), with the same Special Rapporteur.

[10] Resolution 260 (III) B of 9 December 1948. Two Special Rapporteurs were appointed to work simultaneously and independently—Alfaro and Judge Sandström.

declaration on the rights and duties of States.[1] In 1951 the Commission was requested, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law.[2] Finally, it may be noted that by Article 24 of the Statute the General Assembly specifically ordered the Commission to consider ways and means for making the evidence of customary law more readily available.[3]

There are two instances in which matters were referred to the Commission by the Political Committees of the General Assembly; and in both cases these were matters which arose out of the 'cold war'. The first was the decision to refer to the Commission the question of defining aggression.[4] The second occurred in 1954 when a complaint of violation of the freedom of navigation in the area of the China Seas was referred to the Commission.[5]

(*b*) *The practical significance of the distinction between codification and progressive development*

Although the draftsmen of the Statute proceeded on the assumption that there were differences of a substantive nature in the two principal tasks conferred on the Commission, experience seems to have established that, without prejudice to the power of initiative and to the disposal of completed topics (where different considerations arise), it is difficult in the Commission's own work to insist upon the distinction (a feature which, indeed, the Committee of Seventeen had foreseen (see p. 118 above)). The result has been that in practice a single consolidated procedure has been made applicable to both types of work, and the formal differentiation established in the Statute has been blurred. This result seems to be, on the whole, uncontroversial, and is probably inevitable.

It is interesting to note the development of this approach, as reflected in

[1] Resolution 178 (II), Preparatory work was submitted by the Secretary-General (A/CN.4/2) and no Special Rapporteur was appointed in this exceptional case.

[2] Resolution 478 (V) of 16 November 1950. The Special Rapporteur on the law of treaties, Brierly, presented a report in anticipation of the Commission's action on the request of the General Assembly. By the same resolution, the International Court was requested to give an advisory opinion on specific questions relating to the Genocide Convention. See *I.C.J. Reports*, 1951, p. 15. The Court specifically noted the difference between its task and that of the Commission. Ibid., p. 20. The General Assembly has recently returned to this topic, with an interesting shift of emphasis, in Resolution 1452 (XIV) B of 7 December 1959.

[3] The Commission appointed Hudson as Special Rapporteur for this topic. The General Assembly has since discussed different aspects of it on many occasions, and the inclusion of this provision in the Statute, in this rather categoric form, is an indication of its general importance.

[4] Resolution 378 B (V) of 17 November 1950. And see *Third Report* (1951), paras. 35 et seq.

[5] Resolution 821 (IX) of 17 December 1954. The Commission decided that it was not competent to examine these charges. *Seventh Report* (1955), para. 16.

the Commission's reports. In 1950, in connexion with the Draft Declaration on the Rights and Duties of States, the Commission concluded that its function fell within neither of the two principal duties laid upon it by the Statute, but constituted a special assignment from the General Assembly. Accordingly, it transmitted its observations to the General Assembly without recommendations for further action.[1] At the same time it found that the articles of the Draft Declaration 'enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules'.[2] In its Resolution 375 (IV) of 6 December 1949, the General Assembly deemed the draft 'a notable and substantial contribution towards the progressive development of international law and its codification'. In 1952, in connexion with the draft on arbitral procedure, the Commission realized that the draft as a whole could not be based on the exclusive adoption of either the method of codification or that of progressive development, and recognized that some of its suggestions were made *de lege ferenda*.[3] In 1953 it pointed out that while the two aspects should be 'constantly borne in mind'[4] it was probable that 'the same cumulation of functions must apply, in varying proportions, to other aspects of the work of the Commission'. This led it to the view that so far as concerned the final recommendations it seemed to matter little whether a final draft fell within one or other category of work, and that there was no reason for any differentiation between the two kinds of recommendation referred to in Article 16 and Article 23 of the Statute.[5] In 1956, in connexion with the final text on the law of the sea, the Commission went farther. After pointing out the original assumption that the two aspects of its work were different, it continued:

'In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in practice", but also several of the provisions adopted by the Commission, based on a "recognized principle of international law", have been framed in such a way as to place them in the "progressive development" category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.'[6]

[1] *First Report* (1949), para. 53.

[2] Ibid., para. 52. Nevertheless, the Preamble to the Draft refers to the progressive development of international law.

[3] *Fourth Report* (1952), para. 16.

[4] *Fifth Report* (1953), para. 15.

[5] Ibid., para. 54.

[6] *Eighth Report* (1956), para. 26. Therefore the Commission found that in order to give effect to the project as a whole, 'it will be necessary to have recourse to conventional means' (ibid., para. 27). There is some interest in the draft of this passage, as originally suggested by the General Rapporteur for the year 1956. He proposed: 'During the eight years of its existence the Commission has become more and more convinced that the very clear distinction established in the Statute between these two activities cannot be maintained in practice. Not only may there be wide differences of opinion as to whether a subject is already "sufficiently developed in the

In 1960 the Commission reported that its work on the subject of consular intercourse and immunities 'is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's Statute'.[1]

One observation appears to be justified from the preceding survey. Save for the anomalous Draft Declaration on the Rights and Duties of States, it is interesting that the emphatic expressions of opinion by the Commission have always been made in connexion with projects selected for codification in the original provisional list. It is essentially in this sphere that the distinction cannot be maintained. The consequences of the weakening of the distinction, however, are of little direct concern to the Commission, important though they might be when the predominately political phase is resumed after the presentation of the Commission's final recommendations.

(*c*) *The Relations between the Commission and Governments in the course of work on a given project*

This aspect has to be considered in two dimensions, namely, the relations between the Commission and Governments *individually*, and the relations between the Commission and Governments *collectively* in the General Assembly. Before passing to that examination, however, a preliminary observation is indicated.

After the failure of The Hague Conference in 1930, there was a widespread feeling that this was in part due to the insufficiency of the collaboration with Governments in the pre-Conference phase. This feeling is well summarized in the following passage from the *Historical Survey of Development of International Law and its Codification by International Conferences* submitted by the Secretariat to the Committee of Seventeen in 1947:

'It is apparent from a study of the proceedings of [The Hague] Conference that its effectiveness for the solution of the problems inscribed on its agenda suffered from the lack of diplomatic preparation. In fact, the procedure laid down for the preparation of the Conference by the Assembly of the League of Nations in its Resolution of 27 September 1927, failed to provide for negotiations leading to the clarification of the attitude of the Governments on the problems selected for the First Codification Conference. This was partly the result of the decision of the League Assembly to entrust the initiative to convoke the Conference to the League rather than to a particular Government. Another reason was that, as a consequence of that decision, the responsibility for preparing for the conference was conferred upon the Preparatory Committee

practice of States", but also several of the provisions adopted by the Commission, and based on a recognized principle of international law, have been framed in such a way as to be suitable for inclusion in the category of the "progressive development of international law". At first the Commission tried to draw a distinction between articles in the one category and those in the other but has had to abandon the attempt; few of the rules adopted belong purely to codification and many belong partly to one and partly to the other category.' Doc. A/CN.4/L.68/Add. 1, para. 20. Mimeographed only. And see discussion in *I.L.C. Yearbook*, 1956—I, pp. 256, 277.

[1] *Twelfth Report* (1960), para. 23.

rather than upon a Government. It was in the nature of this procedure and of the Preparatory Committee that the solution of the problem of codifying certain chapters of international law was approached from a technical point of view and that, as a consequence, political aspects were left to the Conference itself. The diplomatic Conference could not solve the technical issues without first ironing out political divergencies. Where this was possible—as in the matter of nationality—the Conference was successful; where the time was too short—as in the matter of territorial waters and the responsibility of states—the Conference failed.'[1]

In order to overcome this particular deficiency, the Statute contains a number of provisions designed to give Governments opportunities to bring their influence to bear in the course of the work. Thus Article 16 (*c*) requires the Commission to circulate a questionnaire to Governments, inviting them to supply it with data and information relevant to the project. By Article 16 (*g*) the Commission has to issue certain texts as a Commission document, and it is incumbent on the Secretariat to give it all necessary publicity. By Article 16 (*h*) Governments are to be invited to submit comments and these must be taken into consideration by the Commission. These relate specifically to 'progressive development' and similar provisions appear for 'codification' in Articles 19, 21 and 22. The effect of these provisions is to give Governments ample opportunity to convey *data*—essentially on their own practice—to the Commission in the early stages of the work on a given project, and to submit their comments to the Commission in subsequent stages of the work. In consequence it is possible for political influence to be brought to bear on the Commission's work, at least on an individualistic basis, throughout.

Turning now to the practical application of these provisions, as far as concerns the supply of data the questionnaire method does not appear to have been conspicuously successful. The reason was once explained by the French Government in a telling sentence: 'I have the honour to inform you that the French Government unfortunately cannot consider communicating all the documentary material which has appeared on these . . . topics, representing as it does several tons of its archives.'[2] This observation is particularly acute in so far as concerns general requests for information. However, the problem seems to have been solved on a somewhat different basis following the institution of the valuable *United Nations Legislative Series*, prepared by the Secretariat with the co-operation of Governments, which was inaugurated in 1951 at the Commission's suggestion.[3]

[1] Doc. A/AC.10/5, p. 80.

[2] A/CN.4/19, *I.L.C. Yearbook*, 1950—II, p. 206.

[3] *Second Report* (1950), para. 90 (*b*). From personal experience it can be stated that the adequate preparation of this material may require considerable effort, but the time is usefully spent also for domestic purposes. Much initial clarification of the law of Israel in a systematic form has been attained in the course of this work. The Secretary-General, however, has recently cautioned against 'optimism as to the transmission from Governments' of the type of material included in this *Legislative Series*. See his Report on the question of the Publication of a United

As far as concerns the periodic comments by Governments, in the later phases of work on a topic, the view is sometimes expressed that these are insufficient in quantity, and that as a result the Commission is inadequately made aware in advance of the political reactions to its proposals.[1] In 1958, indeed, the Commission felt little doubt that its work tended to suffer because of defects in the process of obtaining and dealing with the comments of Governments, and it decided to make a slight modification in its procedure in order to give Governments more time to prepare their comments.[2] At the same time, there is another side to the coin, and it may not be wholly accurate to appraise the comments of Governments solely on the basis of a numerical calculation of the number of comments actually submitted. There may be reasons other than those of a professional, technical or personal nature to explain the silence of Governments. The submission of written statements by a Government to the Secretariat is a political act, and the political factor has to be considered by the Government before it reaches its decision to submit comments. That being so, it should be realized that the political implications of the written comment, subjectively in the mind of the Government concerned, may not always be self-evident. A study of the records of the Commission from a subjective point of view such as this may confirm a conclusion that, on account of its own remoteness from the detailed political situations which confront individual Governments, the Commission has not always appreciated fully the political implications of a remark appearing in an ostensibly scientific comment on an apparently scientific text. For reasons such as these, and bearing in mind the possibility that a Government's silence may be explained by fundamental and undisclosed considerations, there may be an element of undue pessimism in the Commission's observation that 'only a small minority' of Governments did submit comments.

The written comments have come to be supplemented by a practice, not wholly desirable, of making oral comments in the course of the annual debates in the Sixth Committee on the Commission's reports. Apart from the fact that this practice unduly prolongs the Committee's debates, at the same time partly distorting them, the summary records of these debates

Nations Juridical Yearbook. *General Assembly, Official Records*, Fifteenth Session (1960), Annexes, agenda item 66 (A/4406, para. 18). This *Legislative Series* now takes the place of a similar compilation produced, before the Second World War, under the auspices of the Harvard Law School, and with the assistance of the United States diplomatic service. See Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933), vol. 1, p. vii.

[1] This aspect is fully discussed by Briggs, 'Official Interest in the Work of the International Law Commission: Replies of Governments to Requests for Information or Comment', in *American Journal of International Law*, 48 (1954), p. 603.

[2] *Tenth Report* (1958), para. 61. The Commission correctly pointed out that in many cases the officials responsible for the preparation of comments would also participate in the General Assembly and other international conferences, and this was one of the reasons why the Commission decided to extend the period of time for the submission of comments.

are not an adequate substitute for properly drafted written comments. Nevertheless, it is now usual for the special rapporteurs, or the Secretariat, to prepare for the Commission a proper digest of these oral comments for the use of the Commission.[1]

Perhaps of greater general significance is the completely new practice of bringing the collective attitude of Governments, as consolidated in a resolution of the General Assembly, to bear on the Commission's labours. Moreover, the impact of this collective attitude is not confined only to the Commission, for the debates in the Sixth Committee facilitate the development of the attitudes of the individual Governments in the knowledge of the attitudes of other Governments, and thus constitute an element of diplomatic preparation for the final phases of the codification effort. For this reason the debate is a useful supplement to the individualistic comment of Governments, especially for the forewarning given of political difficulties. But it must not be assumed that these debates constitute negotiations in the accepted sense of the word: at most there might be some limited negotiation for the immediate purposes of the draft resolution under discussion.

If the purely procedural aspects of codification today are compared with those employed by the League of Nations, it would be fair to conclude that the systematic application of governmental pressures in regular phases of the work constitutes one of the major improvements introduced by the United Nations. At the same time, it appears necessary to insist on the proper maintenance of the orderly procedures mapped out in the Statute. On the other hand, it is believed that—as is exemplified indeed by the Conferences on the Law of the Sea—the general process of codification does not yet contain specific mechanisms (as opposed to the normal processes of diplomacy) for the ironing out of political divergencies. But it is doubtful if it would be practical to attempt to resolve that cardinal problem by hard-and-fast rules.

[1] Normally only member Governments may submit comments. The Government of Switzerland submitted comments on the question of diplomatic intercourse and immunities. *Tenth Report* (1958), Annex. And see discussion in *I.L.C. Yearbook*, 1958—I, pp. 3, 257.

Occasionally the Commission has not considered it necessary to consult Governments before submitting its final report to the General Assembly. An instance of this occurred in connexion with the formulation of the Nuremberg Principles, in 1950, and the resolution of the General Assembly therefore provided for an opportunity to Governments to submit comments in writing, to be taken into consideration by the Commission in connexion with its work on the Code of Offences against the Peace and Security of Mankind. The report of the Sixth Committee observes that without implying that the Commission had violated its Statute in omitting to consult the Governments, the paragraph was meant to give satisfaction to the Governments which had advocated such consultation. A/1639, para. 32 in *General Assembly, Official Records*, Fifth Session (1950), Annexes, agenda item 52. In 1960 the Commission submitted its proposals on '*ad hoc* diplomacy' in the form of an addition to its earlier draft on diplomatic intercourse and immunities, and recommended that they be referred direct to the 1961 Vienna Conference without calling for comments from governments. *Twelfth Report* (1960), paras. 29–38.

Apart from these comments on specific projects, there has been some discussion in the General Assembly, especially in its Twelfth and Thirteenth Sessions, on the Commission's general methods of work.[1] This question became acute after the enlargement of the Commission in 1956, and the discussion was symptomatic of some impatience at the apparent slowness of the Commission in completing its task. During the debates there was an attempt on the part of some delegates in the Sixth Committee to impose certain controls on the method of work adopted by the Commission, but the majority opinion was that the Commission was the best judge of its own procedure, and that the governing criteria should not be the speed at which projects were completed by the Commission, but rather that the quality of the work should not be impaired, and that the representative character of the Commission should be adequately reflected in all stages of its work.

(*d*) *The disposal of completed projects*

Of the topics included on the provisional list for codification, the results of the work may be summarized as follows:

The Commission completed its work on the law of the sea in 1956, and the General Assembly immediately decided, in Resolution 1105 (XI) of 21 February 1957, accepting the Commission's recommendation, to convoke a Conference of plenipotentiaries. The terms of reference of that Conference were comprehensive. They were 'to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem'; and also to study the question of free access to the sea of land-locked countries as established by international practice of States (a matter with which the Commission had not dealt). Participation in the Conference would be open to all States Members of the United Nations and of the Specialized Agencies, and interested Specialized Agencies and inter-governmental bodies were invited to send observers. Further, limited preparatory work by the Secretariat was envisaged, and the report of the Commission was to be the basis for the work of the Conference. The Resolution concluded with the following significant clause:

'11. Calls upon the Governments invited to the Conference and groups thereof to utilize the time remaining before the opening of the Conference for exchange of views on the controversial questions relative to the law of the sea.'[2]

[1] See the Commission's *Ninth Report* (1957), paras. 25–29 and *Tenth Report* (1958), paras. 57–67. And see doc. A/CN.4/L.76 in *I.L.C. Yearbook*, 1956—II, p. 74.

[2] There is already considerable literature on the 1958 Conference. For bibliography, see doc. A/CONF.19/6. And see Johnson, 'The Preparation of the 1958 Conference on the law of the sea', in *International and Comparative Law Quarterly*, 8 (1959), p. 122.

There were, in fact, two questions which had not been completed by the Commission, and to which that paragraph of the resolution had particular relevance. The first was the question of the access to the sea of landlocked States, and the second the question of the breadth of the territorial sea. For the first of these, a preliminary conference of landlocked States convened in Geneva in February 1958, and prepared a memorandum on the subject, which was discussed by the Fifth Committee of the Geneva Conference of 1958.[1] For the second question, the Commission had merely produced a text which purported to describe an inconclusive practice, and which did not lay down a clear rule of law.[2] It was clear that this would be the most difficult problem before the Conference, and it is probable that paragraph 11 of the General Assembly's resolution referred above all to diplomatic negotiations with the object of reaching agreement on that problem. The Conference convened in February 1958, and after intensive work succeeded in drawing up four conventions on the substantive law of the sea, together with an optional protocol on the jurisdiction of the International Court. Incorporated in these conventions are appropriate provisions regarding the access to the sea of landlocked States; however, no agreement was reached on the question of the breadth of the territorial sea, and this was referred back to the General Assembly which was requested to study the advisability of convening a second conference of plenipotentiaries to deal with the topic. By Resolution 1307 (XIII) of 10 December 1958 the question was answered affirmatively, and the Second Conference convened at Geneva in March 1960. This Conference also failed, by an extremely narrow margin (and possibly for purely fortuitous reasons), to mobilize the necessary two-thirds majority for an agreed solution.

The disposal of the Commission's work on the question of nationality, including statelessness, has been dealt with above on pp. 133 et seq.

The Commission's final draft on the question of diplomatic intercourse and immunities was submitted in 1958 with a recommendation that the topic should be consummated by 'the conclusion of a convention'. This recommendation was accepted in principle by the General Assembly in its Resolution 1288 (XIII) of 5 December 1958, which left open the question of the procedure by which the proposed convention would be drawn up. The difficulty here was not so much the principle of convening a conference of plenipotentiaries as the question of its terms of reference, because of the existence of related topics which might conveniently be concluded at the

[1] At the invitation of the Swiss Government, this Conference was attended by Afghanistan, Austria, Bolivia, Byelorussia, Czechoslovakia, Holy See, Hungary, Laos, Luxembourg, Nepal, Paraguay, San Marino, Switzerland. For the memorandum by the Secretariat, see A/CONF.13/29 in U.N. Conference on the Law of the Sea, *Official Records*, vol. 1, p. 306; for the memorandum drawn up by this Conference, see doc. A/CONF.13/C.5/L.1, ibid., vol. 7, p. 67. For the report of the Fifth Committee of the Geneva Conference, see A/CONF.13/L.11, ibid., vol. 2, p. 85.

[2] Article 3 of the Commission's draft Articles on the Law of the Sea.

same conference, in particular that of consular intercourse and immunities.[1] In 1959, however, the Commission's plans to accelerate work on that topic were dislocated by unforeseen circumstances;[2] and accordingly the General Assembly, in Resolution 1450 (XIV) of 7 December 1959, decided to convene a conference of plenipotentiaries in Vienna in the spring of 1961 to complete the work on diplomatic intercourse and immunities only, on the basis of the Commission's draft. Other related questions left open by the Commission included what it termed *ad hoc* diplomacy (since completed)[3] and the relations between states and international organizations.[4] The General Assembly, in Resolution 1289 (XIII) of 5 December 1958, invited the Commission to examine the latter question after it had completed its study of consular intercourse and immunities and *ad hoc* diplomacy. In this connexion it is interesting to note that although the contrary was urged, the General Assembly refused to see in the existence of 'related topics' sufficient justification for imposing a political concept of the unity of the theme on the procedural decisions, similar to what it had done in connexion with the law of the sea. While this may well be correct from the doctrinal point of view, it is questionable whether this is the most practical way of dealing with the question.

The disposal of the Commission's projects on arbitral procedure is in some respects the most significant, as it constitutes the only instance in which the Commission's draft and recommendations have been declared to be unsatisfactory. In 1953 the Commission submitted its draft, in which, as already stated, the distinction between codification and progressive development is blurred, and recommended the conclusion of a convention. This was first discussed by the General Assembly during the eighth session which, on the ground that further comments of Governments were desirable, decided in Resolution 797 (VIII) of 7 December 1953 to postpone the substantive decision. The Resolution noted that the draft 'includes certain important elements with respect to the progressive development of international law relating to arbitral procedure'. Two years later a number of critical observations and suggestions for improving the draft were made, and by Resolution 989 (X) of 14 December 1955 the Commission was invited to reconsider the draft and report back to the General Assembly. The Commission did not take the matter up again until 1957 when a report was submitted by the Special Rapporteur[5] in which, after examining the points of criticism, he proposed a number of essentially textual changes while preserving the general economy of the draft. At the same time he abandoned the suggestion that the work should be consummated by means of

[1] For recognition of this relationship, see *Tenth Report* (1958), para. 57; *Eleventh Report* (1959), para. 28.

[2] *Eleventh Report* (1959), para. 7.

[3] *Tenth Report* (1958), para. 51. And see p. 147, n. 1 above.

[4] Ibid., para. 52.

[5] A/CN.4/109, *I.L.C. Yearbook*, 1957—II, p. 1.

a convention. At its 404th meeting the Commission appointed a representative sub-committee to consider the question,[1] and it raised the fundamental question of the ultimate object to be attained, namely, whether it should be a convention or simply a set of rules which might inspire States in drawing up provisions for arbitration. The Commission decided in favour of the second alternative, as had been proposed by the Special Rapporteur, and after discussion deferred its final consideration of the draft.[2] In 1958, on the basis of a further report by the Special Rapporteur,[3] the Commission prepared a text of what is now called 'Model Rules on Arbitral Procedure', and recommended that the General Assembly adopt the report by resolution.[4] This, again, gave rise to controversy, and the General Assembly in fact declined to take the action recommended. By Resolution 1262 (XIII) of 14 November 1958 it merely took note of the Commission's report and brought what it termed 'the draft articles on arbitral procedure' to the attention of member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration and *compromis*.[5]

It is believed that a combination of three factors may be responsible for this development. The first is the undoubted boldness of the Commission, at the insistence of the Special Rapporteur, in producing a draft based on a concept of judicial as opposed to diplomatic arbitration.[6] The second is a feeling (which may or may not be scientifically accurate) that the element of progressive development is too predominant, thus distorting a work intended essentially to be one of codification, and this without periodic encouragement from the General Assembly (as in the case of the law of the sea). The third, and perhaps the most fundamental, is that given the present composition of the United Nations and certain prevalent ideological tendencies, the very concept of the judicial settlement of international disputes, whether through the International Court or through arbitration, encounters serious political difficulties—witness the innovation of the 1958 Conference on the law of the sea as regards the optional protocol.[7]

[1] *I.L.C. Yearbook*, 1957—I, p. 104.

[2] Ibid., pp. 172 et seq. *Ninth Report* (1957), para. 19.

[3] A/CN. 4/113, *I.L.C. Yearbook*, 1958—II, p. 1.

[4] *Tenth Report* (1958), chapter ii.

[5] It may be noted that if as far as the General Assembly is concerned the treatment of the topic of arbitral procedure is to be regarded as a single unit, the Commission seems to regard the two phases as two separate pieces of work. In its *Tenth Report* (1958), footnote 40, the Commission writes: 'In effect the Commission has presented two final texts on this subject.'

[6] See in particular Professor Scelle's First Report, A/CN.4/18, *I.L.C. Yearbook*, 1950—II, p. 114 and his 1957 Report, A/CN.4/109 previously cited on p. 150, n. 5.

[7] In the draft articles on the law of the sea prepared by the Commission, judicial settlement was envisaged only for the continental shelf. See Article 73, and discussion in the 34th and 35th meetings of the Fourth Committee. *Official Records* (cited above, p. 149, n. 1), vol. vi, pp. 98 et seq. Although the Committee adopted the Article, it was dropped in the Plenary in favour of the optional protocol after a substantive discussion on the problem of a general jurisdictional clause had thrown the political aspects into sharp relief. Ibid., vol. 2, pp. 7, 30.

As for the other topics on the provisional list, interim reports have been submitted on the law of treaties[1] and on consular intercourse and immunities;[2] work on these and on the remaining selected topics is continuing.

The interim Report presented in 1959 on the law of treaties has set off a debate in the General Assembly which goes to the root of the nature of customary international law, and of the impact on it of the process of codification, and this must be briefly noted. In its Report the Commission had refrained for the present from reaching a final decision on the question of the form of its final draft, i.e. whether this should take the form of a treaty or of a code of general character, while inclining towards the latter view.[3] The debate in the Sixth Committee is briefly summarized in the following paragraphs of the Rapporteur's report to the Plenary:

'12. Several representatives expressed their agreement with paragraph 18 of the [Commission's] report which stated that the Commission had not at present envisaged its work on the law of treaties as taking the form of one or more international conventions or as taking the form of a treaty, but rather as a code of a general character.

'13. Other representatives disagreed with that statement and held the view that the best way for the Commission to present its recommendations was in the form of draft international conventions to be considered in United Nations organs or at international conferences.

'14. It was felt, however, that it was too early to recommend a specific method of action because there was not enough information to justify a decision at the present stage.'[4]

The results in the field of codification may therefore be summarized as follows: Out of the fourteen topics included in the provisional list, work has been initiated on nine. Of these nine, the Commission has completed its work on five topics, and work is progressing on the remaining four.[5] Of the five completed topics, two have been consummated by the conclusion of appropriate conventions (the régime of the high seas, the régime of the territorial sea), two are pending (diplomatic intercourse and immunities, statelessness), and the General Assembly is taking no further action on the fifth (arbitral procedure).[6]

[1] *Eleventh Report* (1959), chapter ii. The treatment of this topic has been impeded by the frequent change of the Special Rapporteur. When Sir Hersch Lauterpacht was appointed in 1952, he was requested to take into account the work previously done by the Commission and by his predecessor, and to present his report 'in any manner he might deem fit'. *Fourth Report* (1952), para. 51. For the text of articles previously adopted by the Commission tentatively, see A/CN.4/L.28, *I.L.C. Yearbook*, 1951—II, p. 73, and A/CN.4/L.55, mimeographed only. No similar formal directive appears to have been given to Sir Gerald Fitzmaurice when he was appointed Special Rapporteur in 1955. *Seventh Report* (1955), para. 32. However, he has approached the matter on a similar basis. See his First Report, A/CN.4/101, paras. 1–6, *I.L.C. Yearbook*, 1956—II, p. 105.

[2] *Eleventh Report* (1959), chapter iii; *Twelfth Report* (1960), chapter ii.

[3] *Eleventh Report* (1959), para. 18.

[4] A/4253. *General Assembly, Official Records*, Fourteenth Session (1959), Annexes, agenda item 55. And see discussion in the 601st to 614th meetings of the Sixth Committee.

[5] The law of treaties, consular intercourse and immunities, State responsibility, law of asylum.

[6] The Commission has a different account of the work achieved. See *Tenth Report* (1958), para. 68.

With regard to the disposal of other topics considered by the Commission, it is convenient to distinguish the topics relating to what is sometimes called 'international criminal law' from the other special assignments.

In the field of international criminal law, it is suggested that the formulation of the Nuremberg Principles was essentially concerned with the *lex lata*, and may legitimately be regarded as work of codification. The Commission adopted its formulation in 1950,[1] but made no formal recommendation to the General Assembly, which itself has taken no formal decision beyond inviting member Governments to furnish further observations and requesting the Commission to take them into consideration when preparing its draft code of offences against the peace and security of mankind.[2] The Commission presented its first report on that question in 1951, in the form of a draft Code, which also incorporated a proposed definition of aggression, and its final text in 1954.[3] On the question of international criminal jurisdiction, the Commission, in 1950, decided that it was desirable to establish an international criminal court, and that it was possible to do so, but made no recommendation concerning the conferment of criminal jurisdiction on the International Court.[4] After a series of discussions in the Sixth Committee and in four special committees, two on the question of the international criminal court and two on the question of the definition of aggression, the General Assembly, in 1957, gave up the attempt to dispose of these topics for the time being. The key resolution was adopted on the question of the definition of aggression: by this the General Assembly in effect recognized that the time was not appropriate and the international situation inauspicious for the work to be concluded, and adjourned the discussions *sine die*. In order to keep the question under review it established a committee 'composed of the member States whose representatives have served on the General Committee at the most recent regular session of the General Assembly' to decide when it is appropriate to resume the discussion.[5]

On the question of the Draft Declaration on the Rights and Duties of States, the Commission submitted its Report in 1949 without any recommendations as to future action.[6] In Resolution 375 (IV) of 6 December 1949 the General Assembly noted the draft, and asked Governments for

[1] *Second Report* (1950), Part III.

[2] Resolution 488 (V) of 12 December 1950.

[3] *Third Report* (1951), chapters iii and iv. *Sixth Report* (1954), chapter iii.

[4] *Second Report* (1950), paras. 128–45.

[5] Resolution 1181 (XII) of 29 November 1957, and analogously, Resolutions 1186 (XII) and 1187 (XII), both of 11 December 1957, on the Draft Code of Offences against the Peace and Security of Mankind and International Criminal Jurisdiction. The reference in Resolution 1181 (XII) to 'appropriate time' takes up the theme of Resolution 992 (X) of 21 November 1955 regarding the calling of a general conference to review the Charter itself: and in the preceding discussion it was emphasized that further progress was connected with the review and possible revision of the Charter.

[6] *First Report* (1949), Part II. And see p. 143, above.

further comments; and in Resolution 596 (VI) of 7 December 1951 postponed *sine die* all further consideration of the topic.

The Commission presented its special Report on the question of reservations to multilateral conventions in 1951[1] in which, after a doctrinal discussion, it made a number of practical suggestions. The most important of these was that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of appropriate provisions regarding reservations. This recommendation was adopted by the General Assembly in its Resolution 598 (VI) of 12 January 1951.[2]

9. *Appraisal*

In the light of the foregoing description—at times perhaps detailed—it is possible to approach the fundamental question posed at the beginning of this article, namely: What is the position of the Commission, and of the movement for the codification of international law, in the contemporary international scene? What function is performed by the codification effort in the present-day international society? What are its prospects?

This question is frequently approached in a somewhat formal way, which of necessity leads to impatience at the apparent slowness of the progress, and disappointment at the results actually achieved.[3] From a mere quantitative point of view this is correct, although it must be recognized that, since the Commission is no longer encumbered by special assignments from the General Assembly, it appears to be making more rapid and more acceptable progress than in the first six or seven years of its activity. The Commission itself, however, has discreetly pointed to the existence of more profound factors affecting its work. In a recent review of the first ten years of its activities, it has written:

'. . . there was the important consideration that the whole of international law and international relations was now going through a period of adjustment. In such a situation speed was not necessarily the most important consideration. Time spent in endeavouring to reconcile different points of view and different types of outlooks and

[1] *Third Report* (1951), chapter ii.

[2] In fact the Commission itself has not acted on its own recommendation. Neither its draft articles on the law of the sea, nor those on diplomatic intercourse and immunities, though intended to be adopted in the form of conventions, have contained any guidance on this aspect. The question of reservations is not yet settled by the Commission. See Draft Article 9 proposed by Sir Hersch Lauterpacht in A/CN.4/63 and revised by him in A/CN.4/87; and draft articles 37–40 of Chapter One, Part I of the draft proposed by Sir Gerald Fitzmaurice in A/CN.4/101. *I.L.C. Yearbook*, 1953—II, p. 90 at p. 123; 1954—II, p. 123 at p. 131; 1956—II, p. 104 at p. 126. And see also Resolution 1452 B (XVII) of 7 December 1959.

[3] Thus, Stone speaks of the 'pathetically small' results of the Commission's work. *Legal Controls of International Conflict* (1954), p. 21. For a more recent expression of disappointment, see Honig, 'Progress in the Codification of International Law', in *International Affairs*, 36 (1960), p. 62 at p. 71.

ideas was not time wasted. In the course of the years what would matter was the quality of the work, not whether a greater or lesser period had been spent in producing it.'[1]

Accordingly, it is believed to be more fruitful to avoid passing judgment on the basis of any mechanical or statistical assessment of the work of the Commission, and to attempt to establish the nature of the 'different types of outlooks and ideas' which cumulatively build up pressures affecting the contemporary codification effort. These factors are seen to be of three major kinds: (*a*) the direct impact of the 'cold war', both as a political fact in itself, and as the generator of ideological positions regarding the very nature and function of modern international law; (*b*) the consequences of the changing nature of the modern international society after the rapid (and still incomplete) process of emancipation of new States; and (*c*) the influence of modern technological advances on the material which international law is called upon to regulate. These—and other—kinds of pressures operate cumulatively on the codification effort, and while an attempt may be made to identify and isolate certain individual facets, that is merely for purposes of systematic presentation, and does not affect the fundamental requirement that to place the matter in right perspective, the different factors must be integrated and synthesized one with the other.

The factor of the 'cold war' is rarely articulated openly in the literature of the West, probably on account of the distaste with which the Western lawyer tends to view the intermixture of law and politics. These hesitations are not experienced to the same extent by the publicists of Eastern Europe, and it is, therefore, to them that we may turn in order to see how this factor operates. Thus, in 1951 an authoritative Soviet textbook on international law, and one which is commonly regarded as expressing official views, wrote:

'Already at the first session of the Commission . . . representatives of the Anglo-American bloc aimed to use the codification of international law for legalizing the imperialist methods applied by the leaders of that bloc in international relations (declaration of the supremacy of international law over the national law, evasion of the Charter of the United Nations, etc.). From the Soviet side that concept was rejected, while accepting such rules of international law as may reinforce the elements of democratic legality and its real progressive development.'[2]

[1] *Tenth Report* (1958), para. 68.

[2] Международное право, collective work, edited by Korovin, and published by the Institute of Law of the Academy of Sciences of the U.S.S.R. (1951), p. 19. Even more striking is the description given by another Soviet writer in 1955: 'Taking into consideration that the American imperialists and their satellites have adopted the line of using international law for their criminal purposes, the Commission is faced with a struggle between the representatives of the camp of peace and democracy, headed by the Soviet Union, and the representatives of the camp of war and lawlessness, headed by the United States of America. The imperialist States are aiming to use the work of codification of international law for their reactionary purposes. . . . This reactionary policy is undermining the work of codification of international law.' Lissovsky, Международное

A few years later, however, in 1957, another similarly authoritative Soviet publication was more restrained. After pointing out that in certain cases the drafts prepared by the Commission contained serious deviations from the generally accepted principles of international law, the book observes that 'on the whole, the codification of the norms of international law by the Commission shows a possibility of agreement between States belonging to different social systems, a possibility which is a condition precedent to peaceful co-existence'.[1] It need not, however, be assumed that such critical and unquestioning pronouncements are universally accepted by Socialist publicists. A more analytical approach, interesting for its nuances, can be seen in the following extract from the work of the Yugoslav internationalist, Professor Bartoš. In 1954 he wrote:

'. . . On closer examination the results achieved are seen to point in the direction of the regulation of technical matters, avoiding the regulation of basic unsettled legal problems which are the basis of the political organization of the world. This indicates that within the post-War constellation the majority of States was unable to agree on such provisions of international law which concern vital and basic problems. In this respect, the differences existing in basic views on international politics have not failed to have an influence on matters of codification. None of the powers is ready to tie its hand by way of a precise codification, although each is ready to recognize the binding force of certain legal customs, the existence of which it is difficult to deny, but any further precision of such customs might be exploited by the opposite group of powers.

'Besides the conflict between the great powers, there is a conflict between the great and the small powers. There are many political matters where the small powers request codification, such as the right of States to independence and the right of nations to self-determination. The great powers, on the other hand, and without difference as to their tendencies, strictly decline to give formal recognition to certain principles which favour the position of small States, even though they cannot openly voice opposition to such principles before their own public opinion.'

The learned author gives the history of the Draft Declaration on the Rights and Duties of States as an instance of this, criticizing the attitudes of both the United States and the Soviet Union, and continues:

'All this indicates that codification is, like all law, a superstructure which depends on the nature of its foundation. This, however, cannot be reduced simply to economic factors, but is rather a politico-economic complex of aspirations for world domination held by a given movement or by a given country. . . . In spite of its progress, this codification has the characteristics of imperfection, incompleteness and non-universality. It is the expression of the view of one bloc only, though the bloc which at the

право (1955), p. 32. A Bulgarian writer has put it this way: 'In the work of the Commission to date, there are two basic clashing trends: (1) the cosmopolitan; and (2) that which recognizes the sovereign equality of States as a necessary condition for simultaneous peaceful co-existence of States of the two modern historical types.' Genovsky, Основи на международното право (1956), vol. 1, p. 29. The same theory has also been expressed in Poland. Muszkat (editor), *Zarys Prawa Międzynarodowego Publicznego* (1955), vol. 1, p. 28.

[1] Международное право, collective work, edited by Kojevnikov, and published by the Institute of Law of the Academy of Sciences of the U.S.S.R. (1957), p. 20.

moment constitutes the majority of the States. True codification will be possible only under conditions of total pacification, and only in respect to such topics for which total pacification may contribute to the finding of a compromise solution. Here, also, it appears that politics and law are inseparable.'[1]

The pessimism engendered by this type of situation is also shared by Western writers. As an instance a passage in a recent book by former Judge de Visscher may be cited. He has written:

'Today the chance of codification of international law on a universal scale is nil. The gap between the conceptions of law which confront each other in the General Assembly of the United Nations, even on the most fundamental points, has become so wide that any further enterprise of this order must be regarded as a danger to the progress of international law.'[2]

While these political factors must be given their due place, at the same time if over-emphasis is placed on the so-called bloc views and political realities, leading to 'imperfect' codification, the result in the end will be, of necessity, the abandonment of the effort altogether. But for that there is as yet no serious demand. So long as international conferences are going to reach their decisions on the basis of majority votes (and today there is no practical alternative), all codification will in the nature of things be the expression of the view of the majority, but not necessarily of all.[3] But the view of the majority, especially of a two-thirds majority, is a political fact of considerable weight, and there is nothing even theoretically improper in basing the codification effort on a political fact of that nature.[4]

The conflicting pressures created by the changing nature of the international society following the emancipation of many new States are of a different character, and in some respects more subtle. It has to be recognized that the peoples now achieving independence are themselves heirs to ancient civilizations and legal cultures and wish to bring their heritage into the main stream of what Jenks has called 'the common law of mankind'. They should be encouraged to do so. In so far as concerns the codification

[1] Bartoš, *Medjunarodno javno pravo* (1954), vol. 1, pp. 155–6.

[2] *Theory and Reality in International Law* (1957), p. 147.

[3] Even in the League, which was normally governed in the matter of voting by the principle of unanimity, the principle of majority voting was accepted for the Codification Conference of 1930. See, for instance, the draft rules of procedure, doc. C. 190(1)M.93.1929.V., and discussion in *Acts of the Conference for the Codification of International Law*, vol. 1 (doc. C.351.M.145.1930.V), pp. 21–25 and 62–67.

[4] This dilemma has recently been well expressed by François, who wrote: 'Codification of international law, of necessity, is arranged to a large extent through conventional means. It follows that states opposed to the rules adopted by the majority, even though it be the majority required by the conference rules, will refuse to sign the convention and will not consider themselves bound by the obligations which the conventions contain. It is only with the passage of time, when these conventional rules will have been transformed little by little into customary law, that they will be accepted by states who, today, are not yet ready to accept them.' 'Second International Conference on the Law of the Sea' in *United Nations Review*, No. 12, June 1960, vol. 6, p. 12 at p. 14.

of international law, this expresses itself in two main directions. The first, and of less immediate significance, is the natural desire to incorporate national concepts into the detailed rules of law—a process which may find intellectual encouragement in Article 38 (1) (*c*) of the Statute of the International Court of Justice.[1] The second, and more far-reaching, is the implied rejection of the traditional concept of the universality of international law as conceived by European writers. In its baldest form this concept contains two fundamental and inseparable elements. The first is that international law is *ipso facto* applicable to each member of the family of nations all over the world (subject only to recognized regional or local divergences); and the second is that each new member of the international community is automatically subject to existing *customary* international law as from the commencement of its independent existence, without, in the words of Oppenheim, it being 'necessary to prove for every single rule of International Law that every single member of the international community has consented to it'.[2] It is the second factor which, not always with requisite clarity, is today (though not for the first time) being subject to challenge, as part of the general challenge to the intellectual hegemony of European civilization which is now prevalent. The essence of this challenge is that European international law was developed for imperialist and colonialist purposes and as such is inappropriate to the modern conditions in which colonialism is a thing of the past. In consequence, it should be replaced by new rules in the formulation of which the new States and societies have had a share. Thus, another influential Soviet writer has recently written:

> 'The doctrine according to which customary norms recognized as such by a considerable number of States are binding upon all the States implies a considerable danger in the epoch of co-existence. This point should be specifically emphasized in view of the fact that this doctrine is widely accepted by western writers, and some judgments of the International Court of Justice may be interpreted in favour of this doctrine.
>
> 'This doctrine may certainly encourage a definite group of States to try and impose upon new States, for instance upon socialist States or newly born States of Asia and Africa, some norms which may be considered by this group of States as norms of general international law but which have never been accepted by the new States and which may prove, partly or wholly, inacceptable to these new States. Of course such a tendency to dictate norms of international law in the present circumstances is doomed to failure, but the situation which may be a result of that tendency may lead to serious international complications.'[3]

A point of view such as this may not always find direct expression in the day-to-day work of the Commission, just as it is rarely encountered in the

[1] An interesting, though possibly controversial, example of what can be done in this respect can be seen in Jenks, 'The Universality of International Law', in *The Common Law of Mankind* (1958), at p. 62.

[2] Oppenheim's *International Law*, vol. 1 (8th ed., 1955), p. 18.

[3] Tunkin, 'Co-existence and International Law', in *Recueil des Cours*, 95 (1958), p. 1 at pp. 20–21.

day-to-day work of the International Court,[1] but it is none the less real, and at least from the political point of view not without justification. In this latter sense it is always insistent in demanding due recognition from the Sixth Committee, and it was equally obvious in the two conferences on the law of the sea. Therefore, regardless of legal theory, there is more than a little practical value in the process, initiated by the codification of the law of the sea and now to be continued by the codification of the law of diplomatic intercourse and immunities, of replacing and bringing up-to-date customary rules of law (the content of which may be challenged) by conventional norms (in the formulation of which all have been granted equal opportunity), subject always to the reservation that in so doing the basic fabric of international law and its binding force is preserved intact.[2]

Little need be said here regarding the impact of technological advances on the material of international law. Their presence is felt even in what Bartoš has aptly called 'the regulation of technical matters', let alone in such major new developments so far scarcely within the domain of contemporary international law as the legal aspects of the release and harnessing of atomic energy, or the conquest of outer space—developments which seem to impart an air of unreality to many detailed rules of traditional international law.[3]

Considering pressures such as these, the wonder is not that so little has been achieved (as some would have it), but that the Commission has been able to make any headway at all. It is clear that the insertion of Article 13 (1) (*a*) into the Charter was the direct outcome of small-power pressures on the great powers—the sponsoring powers of the San Francisco Conference; it is equally clear that political motives predominated in the decisions regarding the establishment of the Commission and its Statute. In view of these deliberate decisions it is legitimate to assume that the Commission was established in the knowledge that it would have the task of reconciling, in its own words, 'different points of view and different *types* [our italics] of outlooks and ideas', though it may not have been self-evident in 1947 just what would be involved. At the same time it would be fair to recognize that it is not so much the Commission's output which is disappointing or 'pathetically small', as the inability of the General Assembly to reach final

[1] But note the following powerful expression of these motives in the dissenting opinion of Judge Moreno Quintana in the *Right of Passage* case (merits): 'As judge of its own law—the United Nations Charter—and judge of its own age—the age of national independence—the International Court of Justice cannot turn its back upon the world as it is. "International law must adapt itself to political necessities", said the Permanent Court of Arbitration in its award on indemnities to Russian individuals.' *I.C.J. Reports*, 1960, p. 6 at pp. 96–97.

[2] The warning of de Visscher, in the passage cited on p. 157 above, is pertinent in this connexion.

[3] For a concrete instance in which these factors were all brought to bear, see the debate on State responsibility in *I.L.C. Yearbook*, 1957—I, pp. 154–72.

conclusions on the disposition of all but secondary matters of regulatory significance. Viewing the Commission's work as a whole, there is evident in it a streak of boldness—for instance in the whole complex of international criminal law—which might be criticized not on inherent grounds, but for a certain obliviousness of political realities especially after the hardening of the 'cold war' from 1950 onwards. But then the General Assembly never gave any indication to the Commission that a change of emphasis would be appropriate. Indeed, the General Assembly has referred no more topics to the Commission for progressive development (while apparently trying to accelerate the pace of codification) and has been unable to accept a text, initiated as a project of codification, in which the elements of progressive development were predominant (arbitral procedure).

The reference in the previously cited passage from Bartoš to 'regulatory matters' raises another point of criticism, namely, the adequacy of the Commission's own work-programme as drawn up in its provisional list. It is significant that since 1949 that programme was not changed, nor (until 1960) challenged either in the Commission or in the General Assembly. The question may be asked whether this stagnancy reflects the true position of international law in the contemporary world; whether the provisional list is not too conservative, and whether the results are not, in the long run, disadvantageous for the strengthening of the rule of law.[1] The debate in the Fifteenth Session of the General Assembly shows growing disquiet at this situation.[2]

There is one negative proposition regarding the diplomatic role of the codification effort which appears to emerge from the preceding survey. It is that the process of codification, and the International Law Commission, are not appropriate institutions for the investigation of specific charges against States or the settlement of specific disputes. This proposition is established by the disposal of the charge relating to piracy on the China

[1] An interesting result of this conservatism may be mentioned. Several of the Commission's draft articles on the law of the sea (1956) refer to the air, e.g. Articles 2, 27, 39–45, 47 and 69, and questions of the effect of the codification of the law of the sea on the law of the air were prominent in the two Geneva conferences. Yet the Commission has given no consideration whatsoever to the general international law of the air, and seems to have accepted the view which is implicit in the silence of the Secretariat's original survey (A/CN.4/1/Rev.1), that the customary international law of the air is not appropriate for codification—or at least study—by the Commission. *Sed quaere.*

Lord McNair has recently suggested some fundamental subjects which prima facie demand attention, such as Dependent Territories, including Protectorates and Trust Territories, the Application of Certain Rules of International Law to International Organizations, and the Rules of International Law applicable to Hostilities Undertaken for the Collective Enforcement of Peace. *The Development of International Justice* (1954), p. 29. These seem to be promising fields.

For the view that the International Law Commission would not be the appropriate organ to deal with the question of Outer Space, see statement of the Secretary-General of the United Nations in his press conference of 2 June 1960, Note to Correspondents No. 2176. It may be assumed that the unappropriateness of the Commission is the consequence of the highly political character of the question.

[2] See Postscript, p. 161 below.

Seas.[1] At the same time there are limits to this, for it does not mean that the reference of a *topic* (as opposed to a specific question) to the Commission may not, in appropriate circumstances, constitute an adequate diplomatic solution to an immediate political problem, provided that the Commission is then enabled to conduct its work in complete independence of the original political situation out of which the General Assembly became seised of the item. An instance of this is provided by the early history, in the General Assembly, of the topic of diplomatic intercourse and immunities. On the other hand, clearly this process is only appropriate if the topic is ripe for treatment by the Commission as a matter of codification, or if there is sufficient underlying political agreement to constitute an adequate point of departure for a project of progressive development. If this is not the case, it may be politically spurious to attempt to pass off as a technical juridical problem an issue that is essentially political, and an abuse of the Commission to seek to do so. An instance of this may be seen in the decision of the First Committee in 1950 to refer to the Commission the question of the definition of aggression.

Relatively sparse, then, though the results of the eleven years' work of the International Law Commission may be, they do represent, it is submitted, a significant advance in the techniques of codification. More than anything else this is due to the close integration of the technical work of study and drafting, which is the special function of the Commission, with the application of political controls, which is the special function of the Sixth Committee. The Commission itself reflects, in its composition, the political relationships subsisting periodically at the time of the elections, while the Sixth Committee reflects the constantly changing pattern and the long-term trends of the international political situation. What has to be judged is the sum total of the picture which emerges. If that picture is not as bright as might be hoped, if the bold new approach of the founders of the United Nations and of the Commission has produced disappointing results, it should be frankly recognized that the Commission, and the codification effort as a whole, are victims of an unstable and deteriorating international situation of which the weakening of the United Nations and its authority in the world is symptomatic. No mere tinkering with procedure can lead to any substantial improvements.

Postscript

The Sixth Committee's debate during the Fifteenth Session of the General Assembly on the Twelfth Report of the International Law Commission (1960) gave rise to a complicated discussion on future work in the

[1] See p. 142 above. The discussion at the 366th meeting of the Commission in relation to the Gulf of Akaba affords further confirmation of this view. *I.L.C. Yearbook*, 1956—I, p. 202.

field of the codification and progressive development of international law. The immediate background was the Sixth Committee's meagre agenda which contained no items of substance at all partly because, for the second year running, the International Law Commission's Report was of an interim character calling for no substantive action on the part of the General Assembly. This situation gave rise to a widespread feeling of frustration on the part of many delegates, on the one hand, and on the other to a feeling that international law was not playing a sufficient role in the urgency of the current international situation. But behind this lay more profound factors which include in particular the appearance of a pattern of international relationships and of political strengths which is entirely different from that which existed when the General Assembly last discussed the broad question of the progressive development and codification of international law, in 1947, and when the International Law Commission itself established its programme of work in 1949. The trend of the debate may be briefly summarized. Many representatives, deploring the paucity of the Sixth Committee's agenda, expressed anxiety about that state of affairs. Some saw in it a decline of international law in the United Nations at a time when the conditions prevailing in the world gave increased importance to the role of international law in strengthening peace, in developing friendly and co-operative relations among the nations, in the settlement of disputes by peaceful means and in advancing economic and social progress throughout the world. Others denied that there had been any weakening of the role of international law; in their view the Sixth Committee's position should rather be ascribed to the fundamental differences prevailing in international relations today. As to the reasons for the weakening of the role of international law, several representatives felt that it was due to political causes, in that some Member States took a nihilist attitute to international law and did not observe its rules. They also considered that the United Nations Secretariat has hitherto confined itself to an unduly passive role instead of putting forward questions for study. That fact too was attributable to the faulty geographical distribution of posts in the Office of Legal Affairs, since most of the staff were nationals of precisely those Member States which belonged to military blocs averse to encouraging the development of international law. Other representatives saw the causes of the decline in question either with the Sixth Committee itself, which tended to relinquish its rights and responsibilities—for example through its decision to postpone indefinitely the examination of the question of aggression—or with Member States which, for instance, showed little sense of urgency in communicating their comments on the drafts transmitted to them. Various remedies were proposed. Some representatives, for instance, called for a stricter application of General Assembly

Resolution 362 (IV) of 22 October 1949, regarding the allocation of agenda items to the Committees, and of Resolution 684 (VII) of 6 November 1952, concerning methods and procedures of the General Assembly for dealing with legal and drafting questions. Others suggested questions which might be studied by the Sixth Committee, such as the compulsory jurisdiction of the International Court of Justice, the principles and practices governing the registration of treaties, and the methods and procedures in use by the General Assembly. Another group considered that those questions did not meet current needs, and suggested a study of the legal questions connected with the peaceful coexistence of States with different régimes and of the legal aspects of the problems created by disarmament and the final abolition of colonialism and its consequences, or again a study of the question of neutrality, the question of the succession of States, or the question of the use of outer space. Some representatives also felt that the theory of the sources of international law should be revised to take into account the many resolutions and decisions emanating from international organizations. In the course of the discussion most representatives came to the conclusion that the principle that many new trends in the field of international relations had an impact on the development of international law—whose role had consequently increased in importance—should be taken as a basis for ascertaining whether new topics susceptible of codification or conducive to progressive development had arisen, and that the best course of action would be to revise the International Law Commission's work programme in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among States. Although, however, there were differences of opinion as to the method to be adopted in order to achieve that end, in the course of the discussion agreement was reached to the effect that the General Assembly, at its Sixteenth Session, should study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification. The Member States would be invited to submit their views or suggestions for consideration by the Assembly.[1] The purpose which the General Assembly has in mind is illustrated by the following extracts from the preambles to Resolution 1505 (XV) of 12 December 1960, in which the final decision appears:

'*The General Assembly*,

'*Bearing in mind* the purposes and principles of the United Nations,

'*Considering* that the conditions prevailing in the world today give increased importance to the role of international law—and its strict and undeviating observance by all Governments—in strengthening international peace, in developing friendly and

[1] See Report of the Sixth Committee, doc. A/4605, *General Assembly, Official Records*, Fifteenth Session (1960), agenda item 65.

co-operative relations among the nations, settling disputes by peaceful means and in advancing economic and social progress throughout the world. . . .

'*Mindful* of Article 13 paragraph 1 of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

'*Considering* the extent of progress made by the International Law Commission in the codification of topics listed in paragraph 16 of the report covering its first session,

'*Expressing its appreciation* to the Commission for the work it has accomplished in the field of the codification and progressive development of international law,

'*Considering* that many new trends in the field of international relations have an impact on the development of international law,

'*Considering* that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics,

'*Deeming it necessary*, therefore, to reconsider the Commission's programme of work in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among States. . . .'

APPENDIX I

GENERAL ASSEMBLY RESOLUTION 174 (II)

ESTABLISHMENT OF THE INTERNATIONAL LAW COMMISSION

The General Assembly,

Recognizing the need for giving effect to Article 13, paragraph 1, sub-paragraph *a*, of the Charter, stipulating that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Having studied the report of the Committee directed by resolution 94 (1) of the General Assembly of 11 December 1946 to study:

(*a*) The methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;

(*b*) Methods of securing the co-operation of the several organs of the United Nations to this end;

(*c*) Methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective.

Recognizing the desirability of establishing a commission composed of persons of recognized competence in international law and representing as a whole the chief forms of civilization and the basic legal systems of the world;

Resolves to establish an 'International Law Commission', the members of which shall be elected at the third regular session of the General Assembly, and which shall be constituted and shall exercise its functions in accordance with the provisions of the annexed Statute.

Hundred and twenty-third plenary meeting,
21 November 1947.

STATUTE OF THE INTERNATIONAL LAW COMMISSION

Article 1

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.
2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

CHAPTER I. ORGANIZATION OF THE INTERNATIONAL LAW COMMISSION

Article 2

1. The Commission shall consist of twenty-one members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nationals of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

(As amended by Resolution 1103 (XI) of 18 December 1956.)

Article 3

The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of Members of the United Nations.

Article 4

Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other States.

Article 5

The names of the candidates shall be submitted in writing by the Governments to the Secretary-General by the first of June of the year in which an election is held, provided that a Government may in exceptional circumstances substitute for a candidate whom it has nominated before the first of June another candidate whom it shall name not later than thirty days before the opening of the General Assembly.

Article 6

The Secretary-General shall as soon as possible communicate to the Governments of Members the names submitted, as well as any statements of qualifications of candidates that may have been submitted by the nominating Governments.

Article 7

The Secretary-General shall prepare the list referred to in article 3 above, comprising in alphabetical order the names of all the candidates duly nominated, and shall submit this list to the General Assembly for the purposes of the election.

Article 8

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 9

1. The twenty-one candidates who obtain the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected.

2. In the event of more than one national of the same State obtaining a sufficient number of votes for election the one who obtains the greatest number of votes shall be elected and if the votes are equally divided the elder or eldest candidate shall be elected.

(As amended by Resolution 1103 (XI) of 18 December 1956.)

Article 10

The members of the Commission shall be elected for five years. They shall be eligible for re-election.

(As amended by Resolution 985 (X) of 3 December 1955.)

Article 11

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 12

The Commission shall sit at the European Office of the United Nations at Geneva. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.

(As amended by Resolution 984 (X) of 3 December 1955.)

Article 13

Members of the Commission shall be paid travel expenses and shall also receive a special allowance, the amount of which shall be determined by the General Assembly.

(As amended by Resolution 485 (V) of 12 December 1950.)

Article 14

The Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfil its task.

Chapter II. Functions of the International Law Commission

Article 15

In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

A. Progressive development of international law

Article 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow a procedure on the following lines:

(a) The Commission shall appoint one of its members to be Rapporteur;

(b) The Commission shall formulate a plan of work;

(c) The Commission shall circulate a questionnaire to the Governments, and shall invite them to supply within a fixed period of time data and information relevant to items included in the plan of work;

(d) The Commission may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;

(e) The Commission may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;

(f) The Commission shall consider the drafts proposed by the Rapporteur;

(g) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (*c*) above;

(h) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;

(i) The Rapporteur and the members appointed for that purpose shall reconsider the draft taking into consideration these comments and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;

(j) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and its codification, and transmitted to it by the Secretary-General.

2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow a procedure on the following lines:

(a) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subject;

(b) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(c) The Commission shall submit a report with its recommendations to the General Assembly. It may also, if it deems desirable, before doing so make an interim report to the organ, agency or body which has submitted the proposal or draft;

(d) If the General Assembly should invite the Commission to proceed with its work on a proposal, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (*c*) of that article may not, however, be necessary.

B. CODIFICATION OF INTERNATIONAL LAW

Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(*b*) Conclusions relevant to:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with article 19. The Commission shall decide whether the opinions of any scientific institution or individual expert consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:

(*a*) To take no action, the report having already been published;

(*b*) To take note of or adopt the report by resolution;

(c) To recommend the draft to Members with a view to the conclusion of a convention;

(d) To convoke a conference to conclude a convention.

2. Whenever it deems desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

Chapter III. Co-operation with Other Bodies

Article 25

1. The Commission may consult, if it considers necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

2. All documents of the Commission which are circulated to Governments by the Secretary-General shall also be circulated to such organs of the United Nations as are concerned. Such organs may furnish any information or make any suggestions to the Commission.

Article 26

1. The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.

2. For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavour to include on this list at least one national organization of each Member of the United Nations.

3. In the application of the provisions of this article, the Commission and the Secretary-General shall comply with the resolutions of the General Assembly and the other principal organs of the United Nations concerning relations with Franco Spain and shall exclude both from consultations and from the list, organizations which have collaborated with the nazis and fascists.

4. The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized.

APPENDIX II

List of Resolutions concerning the International Law Commission, the Progressive Development and Codification of International Law, and Related Topics

A. General Assembly Resolutions

38 (I)	11 December 1946	Draft Declaration on the Rights and Duties of States.

94 (I)	11 December 1946	Progressive development of internationa law and its codification.
95 (I)	11 December 1946	Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.
96 (I)	11 December 1946	The crime of Genocide.
174 (II)	21 November 1947	Establishment of an International Law Commission.
175 (II)	21 November 1947	Preparation by the Secretariat of the work of the International Law Commission.
176 (II)	21 November 1947	Teaching of international law.
177 (II)	21 November 1947	Formulation of the Principles recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.
178 (II)	21 November 1947	Draft Declaration on the Rights and Duties of States.
188 (II)	21 November 1947	Draft Convention on Genocide.
260 (III)	9 December 1948	Prevention and Punishment of the Crime of Genocide.
373 (IV)	6 December 1949	Approval of Part I of the Report of the International Law Commission covering its First Session.
374 (IV)	6 December 1949	Recommendation to the International Law Commission to include the Régime of Territorial Waters in its list of Topics to be given Priority.
375 (IV)	6 December 1949	Draft Declaration on Rights and Duties of States.
378 (V)	17 November 1950	Duties of States in the event of the outbreak of hostilities.
478 (V)	16 November 1950	Reservations to multilateral conventions.
484 (V)	12 December 1950	Review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly.
485 (V)	12 December 1950	Amendment of Article 13 of the Statute of the International Law Commission.
486 (V)	12 December 1950	Extension of the term of office of the present members of the International Law Commission.
487 (V)	12 December 1950	Ways and means for making the evidence of customary international law more readily available.
488 (V)	12 December 1950	Formulation of the Nuremberg Principles.
489 (V)	12 December 1950	International criminal jurisdiction.
596 (VI)	7 December 1951	Draft Declaration on Rights and Duties of States.

598 (VI)	12 January 1952	Reservations to multilateral conventions.
599 (VI)	31 January 1952	Question of defining aggression.
600 (VI)	31 January 1952	Review of the statute of the International Law Commission.
601 (VI)	31 January 1952	Report of the International Law Commission covering the work of its Third Session (Chapters VI, VII, and VIII).
602 (VI)	1 February 1952	Ways and means for making the evidence of international law more readily available.
677 (VII)	21 December 1952	Payment of honoraria to Rapporteurs of United Nations bodies.
683 (VII)	6 November 1952	Report of the International Law Commission on the work of its Fourth Session.
684 (VII)	6 November 1952	Methods and procedures of the General Assembly for dealing with legal and drafting questions.
685 (VII)	5 December 1952	Request to International Law Commission to give priority to the codification of the topic 'Diplomatic intercourse and immunities'.
686 (VII)	5 December 1952	Ways and means for making the evidence of customary international law more readily available.
687 (VII)	5 December 1952	International criminal jurisdiction.
688 (VII)	20 December 1952	Question of defining aggression.
797 (VIII)	7 December 1953	Arbitral procedure.
798 (VIII)	7 December 1953	Régime of the high seas.
799 (VIII)	7 December 1953	Request for the codification of the principles of international law governing State responsibility.
821 (IX)	17 December 1954	Complaint of violation of the freedom of navigation in the area of the China Seas.
875 (IX)	4 December 1954	System of allowances to members of commissions, committees and other subsidiary bodies of the General Assembly or other organs of the United Nations.
895 (IX)	4 December 1954	Question of defining aggression.
896 (IX)	4 December 1954	Elimination or reduction of future statelessness.
897 (IX)	4 December 1954	Draft Code of offences against the peace and security of mankind.
898 (IX)	14 December 1954	International criminal jurisdiction.
899 (IX)	14 December 1954	Draft articles on the continental shelf.
900 (IX)	14 December 1954	International Technical Conference on the conservation of the living resources of the sea.
984 (X)	3 December 1955	Amendment to Article 12 of the Statute of the International Law Commission: place of meeting of the Commission.

985 (X)	3 December 1955	Amendment to Article 10 of the Statute of the International Law Commission: term of office of members of the Commission.
986 (X)	3 December 1955	Question of amending Article 11 of the Statute of the International Law Commission relating to the filling of casual vacancies in the membership of the Commission.
987 (X)	3 December 1955	Publication of the documents of the International Law Commission.
989 (X)	14 December 1955	Arbitral procedure.
1040 (XI)	21 January 1957	Nationality of married women.
1075 (XI)	7 December 1956	System of travel and subsistence allowances to members of organs of the United Nations.
1103 (XI)	18 December 1956	Amendments to Articles 2 and 9 of the Statute of the International Law Commission.
1105 (XI)	21 February 1957	International Conference of Plenipotentiaries to examine the law of the sea.
1106 (XI)	21 February 1957	Special allowance to be paid to members of the International Law Commission.
1107 (XI)	21 February 1957	Elimination or reduction of future statelessness.
1181 (XII)	29 November 1957	Question of defining aggression.
1185 (XII)	11 December 1957	Report of the International Law Commission on the work of its Ninth Session.
1186 (XII)	11 December 1957	Draft Code of Offences against the peace and security of mankind.
1187 (XII)	11 December 1957	International criminal jurisdiction.
1202 (XII)	13 December 1957	Pattern of conferences.
1262 (XIII)	14 November 1958	Question of arbitral procedure.
1288 (XIII)	5 December 1958	Diplomatic intercourse and immunities.
1289 (XIII)	5 December 1958	Relations between States and intergovernmental organizations.
1290 (XIII)	5 December 1958	Report of the International Law Commission covering the work of its Tenth Session (Chapter V).
1291 (XIII)	5 December 1958	Question of the publication of a United Nations Juridical Yearbook.
1306 (XIII)	10 December 1958	Question of initiating a study of the juridical régime of historic waters, including historic bays.
1307 (XIII)	10 December 1958	Convening of a second United Nations Conference on the Law of the Sea.
1399 (XIV)	21 November 1959	Report of the International Law Commission covering the work of its Eleventh Session.
1400 (XIV)	21 November 1959	Codification of the principles and rules of international law relating to the right of asylum.

1401 (XIV)	21 November 1959	Preliminary studies on the legal problems relating to the utilization and use of international rivers.
1450 (XIV)	7 December 1959	Diplomatic intercourse and immunities.
1451 (XIV)	7 December 1959	Question of the publication of a United Nations Juridical Yearbook.
1452 (XIV)	7 December 1959	Reservations to Multilateral Conventions—The Convention on IMCO.
1453 (XIV)	7 December 1959	Question of initiating a study of the juridical régime of historic waters, including historic bays.

B. Resolutions of the Economic and Social Council

47 (IV)	28 March 1947	The Crime of Genocide.
77 (V)	6 August 1947	Genocide.
117 (VI)	3 March 1948	Genocide.
153 (VII)	26 August 1948	Genocide.
248 (IX)	8 August 1949	Study of Statelessness.
304 (XI)	14 July 1950	Nationality of Married Women.
319 (XI)	16 August 1950	Provisions relating to Statelessness.
352 (XII)	13 March 1957	Refugees and Stateless Persons.
385 (XIII)	27 August 1951	Nationality of Married Women.
504 (XVI)	23 July 1953	Nationality of Married Women.
526 (XVII)	26 April 1954	Statelessness.
547 (XVIII)	12 July 1954	Nationality of Married Women.
587 (XX)	3 August 1955	Draft Convention on the Nationality of Married Women.
722 (XXVIII)	14 July 1959	Nationality of Married Women.

THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES TO ANNUL EXECUTIVE ACTION*

By D. G. VALENTINE

THE Court of Justice of the European Communities is unique in international affairs. Six European States[1] in 1951 established a Community to run the coal and steel production of their countries as one unit with complete free trade. Owing to the success of this first venture, two further communities were established, the Economic Community and the Atomic Energy Community. As a result of the treaties setting up these communities, these six countries of western Europe will soon possess complete free trade among themselves and a unified customs barrier against the rest of the world.

The integration, however, is not solely economic: it is also political and constitutional. The legislative control over matters of coal and steel has passed from the Parliaments of the six member States and is now vested partly in the hands of a High Authority consisting of nine 'directors'[2] and partly in those of a Council of Ministers, one minister being appointed by each member State.[3] The control of the European Economic and Atomic Energy Communities is similarly vested in a Commission and a Council of Ministers in each case—the Economic Community consisting of nine directors but the Atomic Energy Commission consisting of only five.[4]

When the setting up of the Coal and Steel Community was originally being considered in 1950, there was no intention to create a Court to control it, but only an Arbitral Tribunal.[5] However, the necessity for some strong legal control over the High Authority was soon recognized,[6] although the Luxembourg Government revealed that it was only 'despite certain hesitations' that it was decided to institute a Court.[7] That Court when set up became the Court of Justice of the Coal and Steel Community, and the

* © D. G. Valentine, 1961.

[1] France, Western Germany, Italy, Belgium, Netherlands and Luxembourg.

[2] Eight of these are elected for six years by the member States and the ninth by those eight: European Coal and Steel Community Treaty (hereafter referred to as E.C.S.C. Treaty), Article 10, para. 1. The Treaty establishing the European Coal and Steel Community can be obtained from Her Majesty's Stationery Office.

[3] Article 27, para. 1.

[4] European Economic Community Treaty, Article 157, para. 1. 1; Euratom Community Treaty, Article 126, para. 1. 1.

[5] *Bulletin quotidien*, 28 June 1950.

[6] *Rapport de la Délégation Française sur le Traité Instituant la C.E.C.A.* (October 1957), p. 30.

[7] *Compte Rendu, Session ordinaire*, 1951–2, p. 127.

jurisdiction of that Court has been enlarged so as now to control all three of the European communities.[1]

The principal task of the Court is to review the legality of the legislative acts of the High Authority, the two Commissions and the three Councils of Ministers.[2] It is clear that if the Court were to have been given any power to assess the desirability from a political point of view of a decision of any of these bodies, it would have been acting not as a court of appeal, but as a second chamber with the power of a veto. The control of the Court, therefore, has been limited. It may not look at the merits of a decision, but it can consider only whether the enacting body in passing the measure in question was acting *ultra vires*, or without regard to required procedural matters, or in violation of the Treaty, or whether it has committed a *détournement de pouvoir*. It will at once be recognized that these are the classic heads upon which the French *Conseil d'État* can review French administrative acts. Now, for the first time an international court is acting as a *Conseil d'États*, and the plaintiffs are States, the Council of Ministers, and also enterprises and associations and individuals of the six member countries of the European communities.

This article is an attempt to survey the use made by the Court of this administrative jurisdiction during the last six years[3] in the course of which upwards of fifty cases have been decided.[4]

THE ADMINISTRATIVE JURISDICTION OF THE COURT

I. Appeals by States, the High Authority, the Commissions and the Councils of Ministers against Executive Actions

The jurisdiction of the Court over the legislative enactments of the High Authority is contained in Article 33, paragraphs 1 and 2 of the Coal and Steel Community Treaty.

[1] The present composition of the Court is: Donner, President (The Netherlands), Catalano (Italy), Delvaux (Belgium), Hammes (Luxembourg), Riese (West Germany), Rossi (Italy) and Rueff (France).

[2] The Court in addition, however, has a wide jurisdiction over the member States for breaches of the treaties, over the communities for contractual and delictual faults, as well as certain criminal and advisory functions.

[3] The first case, one brought by the French Government against the High Authority, was decided in December 1954.

[4] Until recently the judgments of the Court were published in French in *Recueil de la Jurisprudence de la Cour* (hereafter referred to as *Recueil*). Now only the findings, without the reasons are published. Some of the early judgments appeared in English in the *Official Journal*, but this practice of the Court of translating the judgments into English has been discontinued. By application to the Court mimeographed copies of the judgments can be obtained. English versions of some of the judgments, edited by the author, are to be found in the recent volumes of the *International Law Reports*. The author is in the process of producing a complete case book in English to be published shortly. The translations used in this article are those of the author.

Article 33, paragraph 1 states:

'The Court is competent to pronounce upon appeals for annulment for incompetence, violation of a substantial procedural requirement, violation of the Treaty or of any rule of law concerning its application or for *détournement de pouvoir* brought against the decisions and recommendations of the High Authority by one of the member States or by the Council. However, the examination by the Court may not include the appreciation of the situation resulting from the facts or economic circumstances in view of which the said decisions or recommendations were taken, unless the High Authority is alleged to have committed a *détournement de pouvoir* or to have patently misconstrued the provisions of the Treaty or any rule of law concerning its application.'[1]

Member States and the High Authority may in turn appeal against the resolutions of the Council, although only on the grounds of incompetence or a violation of a substantial procedural requirement.[2] The substance of these provisions has been incorporated into both the Common Market and Euratom Treaties.[3] These Treaties have been drafted in identical words, the references to the Commission and the Council being in one case to the Commission and Council of Ministers of the Common Market and in the other to the Commission and Council of Ministers of the Euratom Community. The provisions of each Treaty reads:

'The Court of Justice shall determine upon the legality of the acts of the Council and of the Commission other than recommendations[4] and opinions. To this effect, it is competent to pronounce upon appeals for incompetence, violation of substantial procedural requirements, violation of the present Treaty or of any rule of law concerning its application, or for *détournement de pouvoir* brought by a member State, the Council or the Commission.'[5]

[1] 'La Cour est compétente pour se prononcer sur les recours en annulation pour incompétence, violation des formes substantielles, violation du Traité ou de toute règle de droit relative à son application, ou détournement de pouvoir, formés contre les décisions et recommandations de la Haute Autorité par un des États membres ou par le Conseil. Toutefois, l'examen de la Cour ne peut porter sur l'appréciation de la situation découlant des faits ou circonstances économiques au vu de laquelle sont intervenues lesdites décisions ou recommandations, sauf s'il est fait grief à la Haute Autorité d'avoir commis un détournement de pouvoir ou d'avoir méconnu d'une manière patente les dispositions du Traité ou toute règle de droit relative à son application.'

The above translation is the author's own and it varies slightly from the one prepared by the High Authority which, it is suggested, should not be used. The latter, for example, translates—*violation des formes substantielles* as 'major violations of procedure', although it is clear that *substantielles* qualifies '*formes*' and not '*violation*'. Other errors occur when *faits ou circonstances économiques* is translated as 'economic facts and circumstances', and when *toute règle* is given as 'a rule'. It has also seemed preferable to retain the French term *détournement de pouvoir* rather than use the High Authority's translation of 'abuse of power'.

[2] E.C.S.C. Treaty, Article 38, paras. 1 and 3. No cases have been brought under this provision.

[3] Economic Community Treaty, Article 173, para. 1; Euratom Community Treaty, Article 146, para. 1. Both these treaties may be purchased from Her Majesty's Stationery Office.

[4] The term 'recommandations' is unfortunately used in these two treaties to mean something different from what it means in the Coal and Steel Community Treaty. In that Treaty, recommendations are binding with respect to the objectives which they specify—Article 14, para. 3—in these two treaties the term refers to acts which are not binding.

[5] This again is the author's translation. In the official translations our old friend the *violation des formes substantielles* reappears, but this time as 'errors of substantial form', and *violation du présent Traité*, earlier translated as 'violation of the Treaty' here becomes 'infringement of this

No cases have yet been brought requiring any interpretation of the provisions of the Common Market or Euratom Treaties, but the points of law which have had to be decided arising out of Article 33 of the Coal and Steel Community Treaty will clearly govern the interpretation of the provisions in all three treaties.

A. *The Ex-Officio Power of the Court*

In the interpretation of Article 33 the first point requiring to be resolved was whether the Court, when considering an appeal for annulment brought under that article was limited to considering merely the particular grounds of invalidity alleged by the plaintiff, or alternatively whether, of its own motion, the Court could declare a decision or recommendation annulled upon one of the other four grounds set out in that article even if that ground had not been pleaded by the plaintiff.

Either of these two interpretations is tenable. It will be readily accepted that the Court is only to determine appeals actually brought before it, and that it has no power to take the initiative and itself require the High Authority to justify the legality of its decisions—the Court, that is, is a referee and not a participant. It would appear, therefore, to follow logically from this that the Court, when invoked, is to be limited to considering only the arguments submitted to it and that it is not to usurp the function of counsel for the plaintiffs.

Against this interpretation, however, must be set the provision by which the Court is to ensure the rule of law in the interpretation and application of the Treaty.[1] It would appear to be a violation of this provision if the Court, when asked whether a particular decision of the High Authority was valid or not, declared it valid, because, let us say, the ground of incompetence was not alleged, while in a subsequent case holding the same decision invalid, because the pleadings were different and did allege incompetence.

The attitude of the Court on this matter, however, has not been entirely consistent. In one case[2] it declared:

'In the present dispute, the plaintiffs do not accuse the High Authority either of having committed a *détournement de pouvoir* or of having patently misconstrued the provisions of the Treaty, or of a rule of law relating to its application. The Court must, therefore, limit itself to examining whether, in law, the decision challenged violates the Treaty or any rule relating to its application.'

Treaty'. The author has thus found it quite impossible to use the official translations—English it should be noted is not an official language of the Community.

[1] E.C.S.C. Treaty, Article 31. Cf. E.E.C. Treaty, Article 164; Euratom Treaty, Article 136.

[2] *Groupement des Industries Sidérurgiques Luxembourgeoises* v. *The High Authority* (Cases 7/54 and 9/54). *Recueil*, vol. 2, p. 98; *International Law Reports*, 1956, p. 597.

In the very second case that the Court heard,[1] it refused to consider whether the High Authority had committed a violation of a substantial procedural requirement in passing a particular decision. The Court gave two grounds for its refusal: first, that the existence of this violation had only been alleged in the plaintiffs' *Réplique* and not in their Request, so that it was inadmissible under the rules, and secondly, and far more significantly, that 'the public interest' did not require it.

This self-imposed limitation, however, is in conflict with what the Court on other occasions has felt itself able to do. Thus, in one action,[2] although the plaintiffs had not alleged a violation of a substantial procedural requirement, the Court examined whether such a procedural requirement had been violated, without, be it noted, making any suggestion that its examination was required by the public interest. Further, on another occasion,[3] the Court, *ex officio*, undertook an investigation of whether a particular committee had been consulted by the High Authority before the latter passed the decision that was being challenged. The High Authority objected to this investigation, on the grounds that a failure to undertake this consultation had not been alleged by the plaintiffs. The Court, however, replied to this objection by declaring:

'The Court holds that there is occasion for it, of its own motion, to examine this ground for if it were well-founded, an annulment *ex officio* on the ground of violation of the Treaty or of a substantial procedural requirement would be justified'.[4]

The present attitude of the Court, however, is well illustrated by a judgment given in 1959.[5] Here the Court held that according to the Rules of the Court, an allegation that three decisions of the High Authority[6] had been passed in violation of a substantial procedural requirement was not acceptable, because the allegation had not been made in the original Request. The Court then continued:

'However, the duty to give reasons which Article 15 of the E.C.S.C. Treaty[7] imposes upon the High Authority has been prescribed not only in favour of litigants but also with a view to placing the Court in a position fully to exercise the legal control which the Treaty confers upon it.

'In consequence a possible failure to give reasons which fetters this legal control can and must be reviewed by the Court of its own motion.'[8]

[1] *The Italian Government* v. *The High Authority* (Case 2/54), *Recueil*, vol. 1, p. 73; *International Law Reports*, 1955, p. 737.

[2] *The French Government* v. *The High Authority* (Case 1/54), *Recueil*, vol. 1, p. 7.

[3] *The Italian Government* v. *The High Authority* (Case 2/54), ibid., p. 73; *International Law Reports*, 1955, p. 737.

[4] *Recueil*, vol. 1, p. 99.

[5] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 89.

[6] Decisions Nos. 16–57, 17–57 and 18–57.

[7] Article 15, para. 1 states: 'The decisions, recommendations and opinions of the High Authority shall include the reasons therefor, and shall refer to the advice which the High Authority is required to obtain.'

[8] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, pp. 114–15.

Finally, in two further cases[1] concerning decisions of the High Authority which had been implied as a result of the alleged inaction of that Authority over a period of two months, the Court, of itself, examined the question whether there had, in fact, been a delay of two months, and it did this although the High Authority had itself admitted such a delay.

Although this power of its own motion to consider grounds of invalidity which the Court, it is submitted, has now clearly accepted, is in many ways valuable, yet from the point of view of legal order within the Community it may lead to a certain difficulty. This may perhaps be illustrated by referring back to *Nold*'s case referred to above.

It is accepted that unless a case is before the Court in which a decision of the High Authority is being challenged, the Court cannot annul that decision. In *Nold*'s case, the plaintiffs challenged certain decisions of the High Authority, but in their pleadings they did not validly allege any grounds upon which those decisions could have been annulled. The Court, however, of its own motion annulled the decisions on the ground of violation of a substantial procedural requirement. In other words, the action brought by the plaintiffs, although in itself ineffective to cause the annulment of those decisions, nevertheless provided the means by which the Court could of itself annul them.

Now, suppose that the decisions in question had been general decisions, and not individual decisions as they actually were, and suppose further that these general decisions had also been passed by the High Authority in violation of the same substantial procedural requirement as were the actual decisions. If the plaintiffs had challenged these general decisions they could very well in their pleadings have alleged that the decisions were in fact individual decisions and have gone on to challenge their validity on the ground of a violation of a substantial procedural requirement.

On the assumption that the Court realized that the decisions had been passed in violation of a substantial procedural requirement, it would be faced with a dilemma. It could either hold that the decisions, being general decisions, could not be challenged by the plaintiffs on the grounds of the existence of a substantial procedural requirement[2] or, of its own motion, it could hold the decisions void for violating a substantial procedural requirement. If it did the former, and refused to annul the decision, the Court would be allowing an invalid decision to remain unannulled; if it did the latter, it would, in effect, be enabling an enterprise to bring about the annulment of a general decision on grounds which it could not itself have pleaded. This procedure would appear to undermine the whole of the provisions of Article 33, paragraph 2.

[1] *Société nouvelle des Usines de Pontlieue-Acieries du Temple* (*S.N.U.P.A.T.*) v. *The High Authority* (Joint cases 32/58 and 33/58), *Recueil*, vol. 5, p. 275,, and *Société des Aciers fins de l'Est* (*S.A.F.E.*) v. *The High Authority* (Case 42/58), ibid., p. 381.

[2] See the wording of Article 33, para. 2, discussed below.

It is suggested, therefore, that the former alternative is the one more closely in keeping with the terms of the Treaty,[1] and if this is so, then the *ex officio* power of the Court is merely to consider grounds of invalidity which could have been alleged by the plaintiffs: it is not to act as a general guardian of the rule of law.

B. *Decisions and Recommendations*

The only acts of the High Authority which the Court can pronounce upon are decisions and recommendations. By a provision of the Treaty, the High Authority is required to take decisions, formulate recommendations and issue opinions.[2] The difference between these is that decisions are binding in every respect,[3] recommendations are binding with respect to the objectives which they specify while leaving to the party concerned the choice of the appropriate means for attaining those objectives,[4] and opinions are not binding.[5]

It will be noted that the above provision only lays down the different legal effect that decisions, recommendations and opinions are to have; it does not state how one is to determine whether a particular act is a decision, recommendation or an opinion. The matter is further complicated by two factors. First, the Treaty, when it is empowering the High Authority to do certain acts sometimes states that they shall be carried out by means of a decision[6] or by means of a recommendation[7] or by means of an opinion.[8] However, more often, the wording is in no way specific as, for example, where the Treaty states that the High Authority 'shall establish a system of production quotas',[9] 'shall authorise compensation schemes'[10] or, and perhaps the most general wording of all, 'shall take all measures necessary'.[11] The second difficulty is that although most 'decisions' of the High

[1] The terms of Article 31, however, must not be ignored. These state 'The Court is to ensure the rule of law in the interpretation and application of the Treaty'.

[2] E.C.S.C. Treaty, Article 14, para. 1.

[3] Article 14, para. 2.

[4] Article 14, para. 3.

[5] Article 14, para. 4. The only occasion when an opinion 'shall have the force of a decision as defined in Article 14' is when the High Authority, by means of an opinion, disapproves of an enterprise's financing of a project; Article 54, para. 5. The Court, without hesitation has declared that these opinions can form the subject of an action for annulment, saying: 'As for opinions, with the exception of those specified in Article 54, paragraph 5 of the Treaty, they cannot in principle be made the subject of such an appeal'; *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 201.

[6] For example, the method of assessing and collecting levies upon the production of coal and steel are to be fixed by a general decision; Article 50, para. 2.

[7] For example, if discrimination is being practised by buyers, the High Authority shall make the necessary recommendation to the Government concerned; Article 63, para. 1.

[8] For example, the High Authority is required to give a reasoned opinion upon an enterprise's programme of investment; Article 54, para. 4.

[9] Article 58, para. 1.

[10] Article 62, para. 1.

[11] Article 74, para. 1. These 'measures' are in this provision differentiated from 'any recommendations'.

Authority are published by it in the *Journal Officiel* and are described as decisions, the High Authority often proceeds merely by writing a formal letter to the party concerned. The question arises, therefore, whether such a letter is a decision and, thus, subject to challenge.[1]

The Court in dealing with the question of what constitutes a decision of the High Authority has defined it in the following terms:

'An act of the High Authority constitutes a decision when it establishes a rule capable of application; in other words, when in a particular act of the High Authority it decides in an unequivocal manner the attitude which from then on it will take in cases where certain conditions come into existence.'[2]

In applying this definition, the Court has had to determine whether a letter written by the High Authority and sent to the Belgian Government on 28 May 1955 constituted a decision. By the terms of the letter it was stated:

'It is recognised that the assistance granted to Belgian coal mines by way of compensation must be accompanied by a series of measures which the Belgian Government is required to take. The High Authority believes, especially, that the revision of compensation must be conditional upon action by the Government in the manner set out below.'

The action that was then set out, under headings (*a*) to (*d*), included the granting of special credit facilities to enterprises by the reduction of interest rates and by the granting of a State guarantee, the facilitating of short-term credit, the financing of the construction or extension of facilities in the mines, and finally, in agreement with the High Authority, the Belgian Government was to withdraw compensation from inefficient mines.

When the letter was challenged by certain Belgian industries,[3] the High Authority alleged that the proceedings were inadmissible on the ground that the letter was not a decision and that, therefore, no action for its annulment would lie. In its judgment the Court declared:

'In the course of the oral procedure, the defendants posed the question of whether it was possible to regard this . . . as being a decision which is capable of being made the subject of an appeal for annulment under Article 33 of the Treaty. However, in its letter of May 28, 1955, the High Authority has recognized that the grant of compensation must of necessity be accompanied by a series of measures to be carried out by the Belgian Government. The High Authority mentioned, however, that the Belgian Government must carry out four measures, specified as (*a*), (*b*), (*c*) and (*d*). The terms of (*d*) are, therefore, part of the series of measures that the Belgian Government would

[1] See *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199.

[2] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 222. The definition was also stated in *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199, and in *Société de Charbonnages de Beeringen and others* v. *The High Authority* (Case 9/55), ibid., p. 323.

[3] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), ibid., p. 199.

be required to take if the necessity arose. The High Authority has, thus, determined, in an unequivocal manner, the action that it has decided to take in any particular case where the conditions specified under the heading (*d*) of the letter arise. In other words, it has set out a rule capable of being applied if the need arises. It must, therefore, be seen as a decision within the meaning of Article 14, of the Treaty.'[1]

In a later case,[2] the Court had to determine whether a letter written to the plaintiffs on 27 February 1957 setting out the High Authority's views upon their investment programme was an opinion within the meaning of Article 14—and the relevant provision in the Treaty[3] states that the High Authority shall set their views out in an opinion—or whether, as the plaintiffs alleged, the 'opinion' was a disguised decision. After restating its definition of what amounts to a decision[4] the Court declared:

'It is certain, on the one hand, that the opinion of February 27, 1957, does not amount to a rule which is capable of being applied, for it is accepted that it does not impose upon the plaintiffs any legal obligation and, on the other hand, that nothing in the documents in this case leads one to conclude that in sending this opinion the High Authority had specified with certainty what was the attitude which it had already decided to take towards enterprises in cases where they granted an unfavourable opinion.

'The opinion of the High Authority of February 27, 1957, thus, cannot be regarded as a decision within the meaning of Article 14 of the Treaty, with the result that the appeal for annulment brought against this opinion is inadmissible as being brought against an act which cannot be subjected to the jurisdiction of the Court.'[5]

In that passage, therefore, the Court was laying down that what amounts to a decision is a matter of substance and not of form. The High Authority thus cannot disguise a decision by hiding it in a letter or by calling it by another name.

As the Court has declared that 'an act of the High Authority constitutes a decision when it establishes a rule capable of application',[6] it follows that if an act does not establish a rule capable of application it cannot be a decision. The importance of this ruling has been illustrated in a recent case.[7] The High Authority had addressed a letter to the *Caisse*,[8] an organization in Brussels which had been set up by the High Authority to run a system of subsidies, and in this letter the High Authority had confirmed that two enterprises, one Italian and one Dutch, were rightly exempt from paying any tax to the Subsidy Fund. This letter was subsequently published

[1] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 225.
[2] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 201.
[3] E.C.S.C. Treaty, Article 54 para. 4.
[4] See p. 181, above.
[5] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 222.
[6] See p. 181 above.
[7] *Société des Aciers Fins de l'Est* (*S.A.F.E.*) v. *The High Authority* (Case 42/58), *Recueil*, vol. 5, p. 381..
[8] *Caisse de péréquation des ferrailles importées.*

in the *Journal Officiel* of the Community and was referred to by the Trading Division of the High Authority as a 'decision'.

The Court held, however, that the letter was not a decision but rather

'a directive of an internal nature addressed by an administrative superior to the departments under its control and intended to guide the working of those departments'.[1]

Another reason given by the Court why this, and a subsequent similar letter, was not a decision was that:

'The letter does not set out a new principle, but is limited to affirming explicitly a principle which, implicitly, the administration had already applied in the carrying out of Decision 2–57.'[2]

The letter itself, therefore, could not be challenged before the Court. The only means of proceeding was for the plaintiffs to challenge the decision which had laid down the original rule or principle of which the letter was merely an application.

This judgment that for an act to be a decision it must lay down a rule and must not be merely the application of a pre-existing rule, is of importance for enterprises. The pre-existing rule will, in most cases, be embodied in a general decision whereas the application of that rule, if it had been a decision, would have been individual and could have been challenged by an enterprise on any of the four grounds in Article 33, and furthermore, as has been decided by the Court, the enterprise could also have challenged the relevant general decision, and on any of the same four grounds.[3] As it is, the enterprise can only challenge the general decision if it is vitiated by a *détournement de pouvoir* with respect to itself.[4]

A very important ruling upon the meaning of the term 'decision' in Article 33 had to be given in another fairly recent case.[5] The facts were that the High Authority had imposed a tax upon enterprises so as to provide funds out of which a subsidy could be given to those buying imported iron scrap. The High Authority set up the *Caisse* referred to above, and, by Decision No. 2–57, this *Caisse* was to notify enterprises of the amount of tax payable by them and the time within which payment was to be made. If payment was not made within the prescribed time, the *Caisse* could request the High Authority to take a decision which had executory force. The plaintiffs allowed their payment of tax to fall into arrears and the

[1] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Case 42/58), *Recueil*, vol. 5, p. 402. [2] Ibid., p. 403.

[3] *Meroni & Cie, Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 9. See further, pp. 212–14 below.

[4] If the letter declares the existence of a duty upon the enterprise, then by not carrying out that duty the enterprise can eventually get itself fined and against this fine it can appeal under Article 36 and can then challenge the original general decision on any of the four grounds in Article 33—a lengthy and unwieldy process but there is no other.

[5] *Société Nouvelle des Usines de Pontlieue-Acieries du Temple* (*S.N.U.P.A.T.*) v. *The High Authority* (Joint cases 32/58 and 33/58), *Recueil*, vol. 5, p. 275.

Caisse, by a letter addressed to them, specified the amount owing and demanded payment. The plaintiffs challenged the validity of this letter before the Court and the question, therefore, had to be determined of whether this letter of the *Caisse* was to be held to be a decision of the High Authority so that it could be challenged under Article 33. The Court declared:

'The letter constitutes a 'notification' . . . creating the obligation to pay the sums stated.

'Under the régime of Decision 2–57, the 'notifications' represented, in fact, the final word of the administration the High Authority limiting itself, where necessary, to making them executory without claiming to re-examine them. They created an obligation for the recipient enterprise. They contained, therefore, all the requirements of a true administrative decision.

'Under these conditions it is not justified to reserve the character of a decision to the deliverance by the High Authority of an order having executory force, especially as such an action is only undertaken when an enterprise fails to fulfil its obligations.

'Article 33 of the E.C.S.C. Treaty only provides for appeals of annulment against decisions of the High Authority. It is necessary, therefore, to consider whether decisions taken by the C.P.F.I.[1] are equivalent to decisions taken by the High Authority.

'In this respect, one must take into consideration the fact that the C.P.F.I. was an organ of the financial mechanism established by the High Authority and that it received its powers from the latter.

'On the other hand, as has been stated above, the notifications of the C.P.F.I. constituted, in fact, the administrative decision taken at the final instance, while the High Authority could have prevented it if, as an administrative superior, it had taken action against the decisions of the organizations in Brussels.

'Therefore, in order not to deprive enterprises of the benefit of the protection which Article 33 of the E.C.S.C. Treaty has granted to them, it must be admitted that the decisions taken by the C.P.F.I. by virtue of Article 12, paragraph 2 of Decision 2–57 are equivalent to decisions of the High Authority and are, therefore, subject to an appeal for annulment under the conditions set out in Article 33.'[2]

A still further interpretation of the word 'decision' had to be made in a case in 1957[3] where the High Authority took the point that as a decision meant a complete decision and not merely one provision in a decision, an appeal for the annulment of merely one article of a decision could not be brought. The grounds of this contention were not linguistic, but based upon Article 34 of the Treaty, by which annulled decisions have to be referred back to the High Authority and that Authority, as distinct from the Court, is required to take the necessary measures to give effect to the judgment. It was contended, therefore, that, if certain words only could be annulled in a decision, the remaining words might amount to an entirely

[1] *Caisse de péréquation des ferrailles importées*, referred to in the text above as 'the *Caisse*'.

[2] *Société Nouvelle des Usines de Pontlieue—Acieries du Temple* (*S.N.U.P.A.T.*) v. *The High Authority* (Joint Cases 32/58 and 33/58), *Recueil*, vol. 5, p. 298.

[3] *Société Minières du Bassin de la Ruhr groupées au Sein du Comptoir de Vente du Charbon de la Ruhr 'Geitling' et Comptoir de Vente du Charbon de la Ruhr 'Geitling'* v. *The High Authority* (Case 2/56), *Recueil*, vol. 3, p. 9.

different decision from the one originally passed, and one which, in effect, had been brought into being by the Court and not the High Authority. The argument was summarily rejected:

'This contention is not well-founded because by the terms of Article 34, a judgment in no way prejudices the measures which the High Authority is required to take in order to modify the decision, regard being had to the annulment.'

C. *The Four Grounds of Appeal*

The four grounds of appeal granted by Article 33 of the Treaty, namely, incompetence, violation of a substantial procedural requirement, violation of the Treaty or of any rule of law concerning its application, and *détournement de pouvoir*, are the same as the grounds which may be alleged in the French *Conseil d'État* against a French administrative action.[1] They are also virtually the same as those which can be alleged in Belgium and in Italy before the national courts of those countries. This fact has been widely recognized and in the ratification debates of the Coal and Steel Community Treaty it was often mentioned. Speakers made such statements as: 'If I wished to define this new organ in a single word, I would say that it is a *Conseil d'État*.'[2] 'The principles of our French public law are the basis of . . . the Court of Justice.'[3] 'The Court of Justice is organized upon the model of the French *contentieux administratif*,'[4] and the Belgian Government declared that the role of the Court 'is similar in many respects to that of our *Conseil d'État*.'[5]

This being so, it is interesting to consider the manner in which the Court has applied these four grounds of appeal.

(*i*) *Incompetence*

When the Treaty speaks of the High Authority as being incompetent to do a particular act, it refers to its not having been empowered by the Treaty to do the act concerned—that is to say, to its lack of legal competence.[6] Thus, in two recent cases,[7] the plaintiffs alleged that the High

[1] Despite the clear wording of Article 33, one plaintiff has sought to challenge the validity of certain decisions of the High Authority upon the ground that they violated the Constitution of the Federal Republic of Germany and of the Constitution of the Federal State of Hesse. As the decisions were annulled on another ground the Court found no occasion to comment upon this plea. See *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 89.

[2] Coste-Floret, Rapporteur of the Foreign Affairs Commission, *Assemblée Nationale*, Official Reports, 1951, p. 8855, col. 1.

[3] Ibid.

[4] Biever, *Compte Rendu* of the Luxembourg Parliament, 1951–2, col. 1611.

[5] *Exposé des Motifs, Sénat de Belgique, Services Ordinaire*, 1950–1, No. 369, p. 14.

[6] The concept of incompetence falls wholly within what English lawyers term *ultra vires*, although this latter term is wider, and is thus sometimes used to cover, for example violation by a local authority of statutory powers and abuses of power.

[7] *Barbara Erzbergbau A. G. and Others* v. *The High Authority* (Joint cases 3–18, 25, and 26/58), *Recueil*, vol. 6, part I, p. 367, and *The German Government* v. *The High Authority* (Case 19/58),

Authority was incompetent to pass a particular decision requiring certain German Transport tariffs to be modified on the ground that the Treaty authorized the decision in question to be taken only during the five-year transitional period which expired on 10 February 1958, whereas this decision had been notified to the German Government on 12 February. The argument, however, was unsuccessful because, on the facts, the Court held that the decision had been passed on 9 February, and, therefore, within the transitional period, and that its validity was not affected by the ratification having occurred outside that period. However, it is clear that if the decision had been taken on 12 February, as alleged, this would have been an example of incompetence.

(*ii*) *Violation of a substantial procedural requirement*

It is clear that because all the procedural requirements which have to be observed by the High Authority have been laid down in the Treaty, a violation of any one of them, whether it be substantial or not, amounts to a violation of the Treaty.

Nevertheless, the two heads of violation of the Treaty and violation of a substantial procedural requirement are set out in Article 33 as being distinct. It is surprising, therefore, that the Court has on occasions failed to keep that distinction clear. Some examples will illustrate this.

In one case[1] it was alleged that a particular decision of the High Authority concerning price lists was invalid because, before its enactment the Consultative Committee had not been consulted. The Court, however, when dealing with this, clearly did not know whether this defect, if it had existed, would have amounted to a violation of the Treaty, or to a violation of a substantial procedural requirement. The Court stated:

'*The ground that the Consultative Committee has not been consulted in accordance with the legal requirements.*

'The defendant asks the Court to declare this ground inadmissible because it has not been pleaded in the Request.[2] The Court is of the opinion that this ground has to be examined by the Court acting of its own motion, because if it were well-founded an annulment *ex officio for violation of the Treaty or for violation of a substantial procedural requirement* would be justified.'[3]

In a later case[4] the High Authority by a particular decision[5] had declared that the plaintiffs owed a sum of over 54 million lire subsidy to the fund set

Recueil, vol. 6, part I, p. 469. The same point was also taken in *Compagnie des Hauts-Fourneaux et Fonderies de Givors and Others* v. *The High Authority* (Joint cases 27–29/58), ibid., p. 501, in respect of a similar decision concerning tariffs on the *Société Nationale des Chemins de Fer Française*.

[1] *The Italian Government* v. *The High Authority* (Case 2/54), *Recueil*, vol. 1, p. 73; *International Law Reports*, 1955, p. 737. [2] The plaintiffs first raised it in their *Réplique*.

[3] *Recueil*, vol. 1, p. 99. The author's italics.

[4] *Meroni & Cie., Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil* vol. 4, p. 9. [5] The decision was taken on 24 October 1956; it was not given a number.

up to subsidize the price of imported iron-scrap. The plaintiffs alleged that the decision was based on incorrect facts and that it had not been supported by reasons. The Court, in annulling the decision, declared:

'The insufficiency of the reasoning and the failure to publish the data upon which the decision of October 24, 1956, has been based, *constitute of themselves violations of the Treaty* such as to require the annulment of this decision.'

The confusion only becomes deeper when one finds that the plaintiffs had used the fact of this lack both of reasoning and of data to support a claim not of the violation of a substantial procedural requirement, nor even of a violation of the Treaty, but of a *détournement de pouvoir*.

It is suggested, however, that there does exist a clear distinction between violation of a substantial procedural requirement and violation of the Treaty and that it is possible to conceive of a decision which in its wording and effect is in full compliance with the Treaty, yet during the stages preceding its enactment procedural requirements have not been observed. The decision, on its wording alone, could not therefore be challenged: it would only be the manner of its enactment that in such a case would be open to attack.

This distinction between the stages of enactment and the end product was illustrated in the first case ever decided by the Court,[1] when it had to determine a possible ground of a particular decision's invalidity. The Court took the point that if the decision in question could be regarded as enacted under Article 60 of the Treaty, the Council of Ministers would have had to have been consulted. A failure to consult the Council, therefore, would have been a violation of the Treaty, but because that violation would have occurred in one of the preliminary stages towards the final enactment of the decision, that decision itself would not have been void by reason of a violation of the Treaty but only by reason of a violation of a substantial procedural requirement. The Court said:

'The Court has examined *ex officio* the question whether Article 1 of Decision 2–54 constitutes a violation of a substantial procedural requirement.[2] By its text the Article defines only the conditions under which the new price lists have to be published. However, when this Article is considered together with Decision 1–54 it can be asked whether it does not indirectly complete the definition of prohibited practices. If this were the case, the Council should have been consulted in accordance with Article 60, paragraph 1. As such an official consultation has not taken place, and cannot be replaced by the High Authority simply informing the Council, *Article 60 paragraph 1 might have been violated.* However, the Court is of opinion that Article 1 of Decision 2–54 does not contain a complement to the definition of discriminating practices, nor an

[1] *The French Government* v. *The High Authority* (Case 1/54), *Recueil*, vol. 1, p. 7.

[2] This is loose phraseology. Article 1 of this decision cannot constitute a violation of a procedural requirement. The Court is intending to refer to the mode of enacting Article 1 of this decision and to see whether that mode of enacting violated a substantial procedural requirement.

indirect definition, but is limited to regulating the system of the publication of price lists'.[1]

In the above two instances the Court was, in effect, stating that consultation, either with the Consultative Committee or with the Council of Ministers, amounted to a substantial procedural requirement. The Court has also, however, applied the term substantial procedural requirement in a very different sense.

By Article 15 of the Treaty, 'the decisions, recommendations and opinions of the High Authority shall include the reasons therefor, and shall refer to the advice which the High Authority is required to obtain'. Of this provision, the Court has stated:

'The Treaty by Articles 5[2] and 15 sets out the general principle that the High Authority must support its decisions with reasons and that it must publish those reasons, but the Treaty does not prescribe the extent of this obligation in any detail, nor does it state what matters have to be taken into consideration.

'[Article 15] when interpreted in a reasonable manner requires the High Authority to set out in the preamble to its decisions what are those essential elements of the existing situation which legally justify the measure in question.'[3]

A failure to observe the requirements of those provisions amounted in the opinion of the Court to a violation of a substantial procedural requirement.

A further example is a case where an enterprise[4] appealed against a decision of the High Authority passed on 24 October 1956 by which a fine was imposed upon it. The grounds of the appeal were that the decision did not adequately set out the reasons for the decision having been taken. The only reasons given were:

'That the plaintiffs . . . omitted from April 1, 1954, to pay to the *Caisse* the contributions due from them in conformity with the decisions set out below.

'That the sums due for the period from April 1, 1954, to June 30,1956, amounted to the sum of 54,819,656 lire.'[5]

Of this decision, the Court said:

'These two paragraphs do not amount to a statement of those considerations both of law and of facts upon which the decision of October 24, 1956, was based.

'This decision thus lacks the necessary requirements to enable any legal control to be properly exercised over it.

'The decision of October 24, 1956, therefore, does not comply with the requirements of Article 15 of the Treaty by which "decisions . . . of the High Authority are to be supported by reasons".'[6]

[1] *The French Government* v. *The High Authority* (Case 1/54), *Recueil*, vol. 1, at p. 31.

[2] Article 5, para. 2 also lays down that 'The Community shall . . . publish the reasons for its action'.

[3] *The Netherlands' Government* v. *The High Authority* (Case 6/54), *Recueil*, vol. 1, p. 201, at p. 219; *International Law Reports*, 1955, p. 750.

[4] The right of enterprises so to appeal is granted by Article 33, para. 2. See p. 205, below.

[5] *Meroni & Cie, Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 29.

[6] Ibid.

In another case[1] the High Authority by three decisions[2] authorized an agreement between three Ruhr sales organizations not to sell coal to any wholesaler who had not sold in the previous year within the Common Market at least 60,000 tons of coal mined within the Community.[3] When these decisions were challenged the plaintiffs alleged that they had been passed in violation of a substantial procedural requirement in that they did not set out the reasons why this agreement had been authorized. This contention was upheld by the Court and the decisions were annulled, the Court saying:

'The absence of any justification of the quantitative limits introduced does not reveal that in taking the decisions challenged the High Authority has also examined whether those limits have not a more restrictive character than a substantial improvement in distribution requires, such as constitutes the object and aim of Article 65, paragraph 2b.

'Under these conditions the reasoning of Decisions 16/57, 17/57 and 18/57 does not indicate . . . in a sufficient and adequate manner the considerations of fact and of law upon which these decisions taken have been based.

'They do not permit any legal control and in particular upon the question of knowing whether the High Authority has observed Article 65, paragraph 2.'[4]

In other judgments the Court has amplified this requirement that decisions shall be supported with reasons. It has thus stated:

'The Treaty does not require the High Authority to set out—and much less to refute —the dissenting opinions expressed by advisory bodies or by their members.'[5]

'It is not necessary for the High Authority to discuss every imaginable objection which might be brought against the decision.

'Speaking generally, it was not necessary in the present action to support with reasons in an independent and exhaustive manner the article challenged which forms part of a complex decision. Sufficient reasoning can be deduced from the context of all the statements relied upon to support the decision as a whole.'[6]

Although the Court in nearly all its judgments has assumed that a failure to give supporting reasons means that a substantial procedural requirement has been violated, one case throws certain doubts upon this. In the

[1] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 89.

[2] Decisions 16–57, 17–57 and 18–57.

[3] By the Treaty the High Authority is required to authorize agreements to engage in joint selling of specified products if it finds, *inter alia*, (*a*) that the joint selling will contribute to a substantial improvement in the distribution of the products in question; and (*b*) that the agreement in question is essential to achieve these results, and is not more restrictive than is necessary for that purpose; Article 65, para. 2.

[4] *Firma I., Nold K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, at pp. 115–16.

[5] *The Netherlands' Government* v. *The High Authority* (Case 6/54), *Recueil*, vol. 1, p. 201, at p. 220; *International Law Reports*, 1955, p. 750; and *Industrie Siderurgiche Associate* (*I.S.A.*) v. *The High Authority* (Case 4/54), *Recueil*, vol. 1, p. 177, at p. 196.

[6] *Sociétés Minières du Bassin de la Ruhr groupées au Sein du Comptoir de Vente du Charbon de la Ruhr 'Geitling' et Comptoir de Vente du Charbon de la Ruhr 'Geitling'* v. *The High Authority* (Case 2/56, *Recueil*, vol. 3, p. 9, at p. 36.

case in question,[1] an Italian enterprise alleged that a particular decision of the High Authority[2] was vitiated by a *détournement de pouvoir*. The reason the plaintiffs alleged was that the decision violated the rules of good administration by not reporting the dissenting opinions which had been given when the decision had been discussed in the various consultative committees before it had been enacted. The Court declared:

'The plaintiffs see a breach of the rules of good administration and, therefore, grounds for establishing a *détournement de pouvoir* from the fact that the High Authority, in setting out the reasons for taking the decisions in question, has neglected to refute the dissenting opinions expressed in the consultative bodies. . . . The Treaty does not require the High Authority to set out—and, therefore, certainly not to refute—the dissenting opinions expressed by the consultative bodies or by some of their members. This failure, therefore, of which the plaintiffs accuse the High Authority, cannot be considered as proof, or even as the beginning of proof, of the existence of a *détournement de pouvoir*.'[3]

It will be noted that the Court here, instead of declaring that this failure would, if anything, go to establish a violation of a substantial procedural requirement held instead that because the High Authority was not required to set out these dissenting opinions, therefore this allegation did not prove a *détournement de pouvoir*. This statement presumably has the converse that if these opinions had been required to be stated, a failure to state them would have amounted to a *détournement de pouvoir*.

In all these cases it is being assumed by the Court that a violation of a substantial procedural requirement by a failure to give supporting reasons forms merely one ground for annulling a decision or recommendation. One case,[4] however, throws grave doubts upon this assumed situation. An enterprise[5] had submitted its investment plan to the High Authority for its approval. By the Treaty, it is stated that if the High Authority disapproves of such an investment plan it shall do so, not by means of a decision, but by means of an opinion, which nevertheless is to have the force of a decision[6] and, as an exception to Article 33, an appeal can be brought against this opinion.[7] The High Authority, by a letter dated 19 December 1956 addressed to the plaintiffs, declared:

'The High Authority has examined your investment plan dated July 28, 1956. Under the present circumstances the High Authority had no other alternative but, following Article 54, paragraph 4 of the Treaty, to reply to your investment plan by an unfavourable opinion.'

[1] *Industrie Siderurgiche Associate* (*I.S.A.*) v. *The High Authority* (Case 4/54), *Recueil*, vol. 1, p. 177. [2] Decision 2–54. [3] Ibid., at p. 196.
[4] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 201.
[5] Appealing under Article 33, para. 2; for the terms of which see p. 205 below.
[6] See further, p. 180, note 8 above.
[7] Article 54, para. 5.

The plaintiffs appealed against this opinion on the ground that it did not comply with the requirements of Article 15 of the Treaty which specifies that, like decisions and recommendations, opinions must also be supported with reasons. In its judgment the Court said:

'As for supporting reasons, the Court holds, in agreement with the conclusions of the advocate general, that these are non-existent. The words "under the present circumstances" cannot, in effect, be considered as mentioning the essential elements of the factual situation upon which the legal justification of the measure must depend.

'Many of the conditions imposed by the Treaty have, therefore, not been complied with. Whereas among these there are certain formalities which do not affect the nature or the existence of the act, it appears that the giving of reasons for an opinion is not merely required by Articles 5, 15 and 54, paragraph 4 of the Treaty, but that *it constitutes an essential element, indeed a constitutive part of such an act, of such a nature that the absence of supporting reasons implies the non-existence of an opinion.* Hence the letter of December 19, 1956, does not constitute an opinion within the meaning of Article 54, paragraph 4 of the Treaty and *Appeal 1/54 is inadmissible for want of subject matter—the acts which it challenges being non-existent in law.*'[1]

This finding is extremely far-reaching. The Court now appears to have implied that where a decision is not adequately supported by reasons it does not in law exist at all, so that an appeal need not be brought against it—or rather that, as in the above case, an appeal so brought is inadmissible as there is nothing against which it can be brought. The Court, in this action, has not sought to make any distinction between an opinion having the force of a decision, and a decision within the meaning of Article 33, and indeed, what applies to a mere opinion must *a fortiori* apply to a decision. Hence it seems that any decisions passed by the High Authority without adequate supporting reasons do not exist in law at all.

Further, unless the Court is going to limit the above judgment to the case of opinions issued disapproving of investment plans, it is difficult to see why this should not also be the position in the case of decisions of the High Authority which constitute a *détournement de pouvoir* or which have been passed in violation of the Treaty, and indeed, with greater force. If the High Authority purports to pass a decision on a matter over which it has no legal competence, that 'decision' must surely *ab initio* be void and of no effect so that, as in the present case, an appeal against it is inadmissible as being against a legally non-existent act.[2] Yet if a decision is 'non-existent in law' and void, the mere fact that it is not appealed against within the time period during which an appeal is open will not render that decision existent in law and valid—once non-existent, always non-existent, once void, always void. This is clearly different from the alternative situation

[1] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 201, at p. 220. The author's italics.

[2] Yet the paradox of this is that unless such an inadmissible appeal is brought, the Court will have no occasion on which it can declare the particular act to be non-existent.

where a decision passed in violation of the Treaty, &c., is in existence but is voidable if appealed against within a stated time period. If, therefore, it is not so appealed against it continues in existence and is no longer voidable. In the past it has always been assumed that the decisions of the High Authority were of this latter type. The Court has now declared that some at least are of the former type.

(*iii*) *Violation of the Treaty*

The overlap has already been mentioned which exists between a violation of a substantial procedural requirement and a violation of the Treaty. There exists also, in theory, a difficulty in determining the boundary between the heads of incompetence and violation of the Treaty. Thus, if the High Authority deems that the Community is faced with a period of manifest crisis it is required by the Treaty to establish a system of production quotas.[1] When the Community is so faced with such a crisis, if the High Authority, instead of establishing these production quotas, passed a decision authorizing States to impose import quotas, it would appear that this decision could be annulled for violation of the Treaty—the Treaty requiring the High Authority to do one thing and the Authority doing another. It would also appear that this decision could be annulled on the ground of incompetence, as the High Authority has done an act which by the Treaty it is not empowered to do.

In practice the Court has also met with the further difficulty of drawing the line between violation of the Treaty and *détournement de pouvoir*. In an early case,[2] the Italian Government challenged a decision of the High Authority on the grounds that it violated one of the transitional provisions annexed to the Treaty. The Court declared:

'The plaintiffs request the annulment of Articles 1, 2 and 3 of Decision 2–54 for violation of Paragraph 30 of the Convention containing the Transitional Provisions. . . .

'Paragraph 30 prohibits an extension to the Italian market of the system of deviations from [enterprises] price lists. Since Decision 2–54 has not taken this prohibition into account, it violates a legal rule concerning the application of the Treaty.'[3]

The decision, therefore, was annulled by the Court on the ground of violation of the Treaty.

In two subsequent cases[4] this same decision was challenged by two Italian enterprises.[5] Under Article 33, paragraph 2, however, enterprises

[1] Article 58, para. 1.

[2] *The Italian Government* v. *The High Authority* (Case 2/54), *Recueil*, vol. 1, p. 73; *International Law Reports*, 1955, p. 737.

[3] *Recueil*, vol. 1, p. 73.

[4] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), ibid., p. 123; *International Law Reports*, 1955, p. 886. And *Industrie Siderurgiche Associate* (*I.S.A.*) v. *The High Authority* (Case 4/54), ibid., p. 177.

[5] The reason for this duplication was that the Court in its early days refused to publish information concerning what Requests had been received; a practice which was reversed in July 1954—see *Avis* of the Court, *Journal Officiel*, 20 July 1954.

can only challenge a general decision, such as was the one here in question, on the grounds of a *détournement de pouvoir* affecting them.[1] The plaintiffs, therefore, alleged a *détournement de pouvoir* by arguing that there had been a violation of paragraph 30 of the Convention containing the Transitional Provisions. One of the plaintiffs declared:

'The decision challenged robs this paragraph of all practical meaning. The provision is intended to protect the Italian steel industry and especially the small and medium sized enterprises which are grouped within the plaintiffs' association.'[2]

The plaintiffs, being an enterprise, were not allowed to allege that this violation amounted to a violation of the Treaty: they therefore alleged that it amounted to a *détournement de pouvoir*.

When considering the admissibility of the appeal, the Court took no point on this contention but merely made the factual statement:

'In the present case the plaintiffs plead and support with reasons, a *détournement de pouvoir* affecting the enterprises which they represent. This plea is based upon the terms of Paragraph 30 of the Convention containing the Transitional Provisions. . . .'[3]

The arguments of the plaintiffs in these cases were not considered by the Court in any detail because the decisions being challenged had already been annulled, so that there was no discussion of the validity of these arguments. However, they were entertained by the Court as being admissible arguments. These cases show, therefore, that a particular contention when made by the Italian Government was accepted by the Court as revealing a violation of the Treaty, and that the same violation of the Treaty when alleged by Italian enterprises was accepted at any rate as prima facie evidence of a *détournement de pouvoir*.

(*iv*) Détournement de pouvoir

The Court itself has never expressly defined the term *détournement de pouvoir*, but it has impliedly accepted a definition on several occasions. Thus, the Court did not dissent from the definition given in classical terms by the High Authority, when it declared:

'There is a *détournement de pouvoir* when an administrative act is objectively in accordance with the rule of law but subjectively vitiated by reason of the aim being pursued by the administrative authority.'[4]

[1] See p. 205, below.

[2] *Recueil*, vol. 1, p. 191.

[3] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), ibid., p. 123, at p. 139; *Industrie Siderurgiche Associate* (*I.S.A.*) v. *The High Authority* (Case 4–54), ibid., p. 177, at p. 193.

[4] See the High Authority's Defence in *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199, at p. 211. This definition was repeated in *Société des Charbonnages de Beeringen and Others* v. *The High Authority* (Case 9/55), *Recueil*, vol. 4, p. 323 at p. 335.

No decision or recommendation of the High Authority has yet been annulled upon the ground of *détournement de pouvoir*, but in the course of its judgments the Court has given some examples of facts which would have justified such an annulment had they been established. A mention of some of these may be of value.

Examples of détournement de pouvoir

(1) By Article 59 of the Treaty, if the High Authority finds that the Community is faced with a serious shortage of coal or steel, it must bring this situation to the attention of the Council of Ministers and must make proposals for allocating such resources as exist. By Article 53 (*b*) the High Authority may at any time create such financial arrangement common to several enterprises as it considers necessary. Of these two provisions the Court has said:

> 'It must be recognized that a *détournement de pouvoir* would have occurred if the High Authority had found itself faced with a situation which necessitated the application of the procedure set out in Article 59, but, nevertheless, in order to avoid the guarantees of Article 59 it had deliberately preferred to invoke Article 53 (*b*) and the financial arrangements which it contains.'[1]

The Court gives no reasons for this statement but the *détournement* would appear to occur because although the High Authority's action would objectively be valid within the terms of Article 53 (*b*), yet it would be vitiated because the provisions of that article were not intended to be used in a situation which is expressly provided for by Article 59.

(2) By Paragraph 26 of the Convention containing the Transitional Provisions, the High Authority was empowered during the years 1951–8, which were known as the transitional period, to subsidize the price of Belgian coal by means of a system of compensation payments. The aim of this compensation was declared by the Convention to be 'to make it possible to bring the price of Belgian coal to all consumers in the Common Market as close as possible to prices in the Common Market generally, so as to reduce Belgian prices to a level near that of the estimated costs of production at the end of the transitional period'.[2] Of this provision the Court said:

> 'There would be no question of a *détournement de pouvoir* if the sole measure which the High Authority had taken with a view to achieving the aims of Paragraph 26 was precisely one which consisted in lowering the price of Belgian coal. In default of proving that the level of prices which the High Authority had fixed when drawing up its decision . . . was different from the level obtained by a price determination correctly

[1] *Compagnie des Hauts Fourneaux de Chasse* v. *The High Authority* (Case 2/57), *Recueil*, vol. 4, p. 129, at p. 147.

[2] Convention containing the Transitional Provisions, paragraph 26. 2 (*a*).

made in accordance with the provisions of Paragraph 26. 2 (*a*) of the Convention, the decision taken could not be vitiated by *détournement de pouvoir*.'[1]

A little later the Court went on:[2]

'If the High Authority—as the plaintiffs allege—had fixed the prices with a view solely to equating them to the prices of the Common Market, and had completely ignored the level of the estimated costs of production at the end of the transitional period, its decision would be vitiated by a *détournement de pouvoir* and would have to be annulled.'

In both these statements the Court is interpreting the wording of paragraph 26. 2 (*a*) of the Convention, set out above, as meaning that the High Authority possessed the power to fix the price of Belgian coal at the price ruling in the Common Market generally, with the object of reducing Belgian prices to a level near to that of the costs of production at the end of 1958. If, therefore, the High Authority exercised its power, but did not bear in mind the object lying behind the use of that power, it would commit a *détournement de pouvoir*.

(3) By Article 61 of the Treaty, if the fixing of maximum prices becomes necessary in order to keep prices at their lowest possible level, the High Authority, in certain circumstances, may fix such prices for coal and steel.[3] In a case where it was alleged that the High Authority when making a decision in exercise of this power had committed a *détournement de pouvoir*, the Court declared:

'This ground [of appeal] requires one to judge whether when fixing maximum prices by virtue of Article 61 of the Treaty, the High Authority sought not so much the objectives which it declares, particularly a lowering of prices, but in reality sought to act against agreements and concentrations of enterprises.

'It would thus have used the powers which were given to it by Article 61 for a purpose other than the one for which those powers were given.'[4]

This appears to be a clear instance of *détournement de pouvoir* and calls for no comment.

How détournement de pouvoir *may be proved*

As it is clear from the definition of *détournement de pouvoir* given by the High Authority and set out above[5] that the vitiating elements in a decision annulled on this ground are the subjective intentions of the High Authority, the question arises of how those intentions are to be established. On this the Court has not regarded itself as in any way limited and has consulted *travaux préparatoires*, which have included the minutes of the Council of

[1] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199, at p. 307. [2] Ibid., at p. 309. [3] Article 61, para. 1 (*a*).

[4] *The Netherlands' Government* v. *The High Authority* (Case 6/55), *Recueil*, vol. 1, p. 201, at p. 226. *International Law Reports*, 1955, p. 750. [5] See p. 193.

Ministers and of the Consultative Committee, where these bodies were required to be consulted before a decision was taken.[1] The Court has also, on occasion, referred both to the report of the Mixed Commission set up to consider the compensation of the Belgian coal industry,[2] as well as to the High Authority's own preliminary calculations[3] and has recognized that a comparison between prices previously existing within the Common Market and those prescribed by the particular decision in question may also be a guide.[4]

Main and subsidiary motives for a decision

To establish a *détournement de pouvoir* a plaintiff has to establish the existence of a wrongful intention on the part of the administrative body concerned. What is the Court's attitude to be, therefore, if the motives of the High Authority are many and some of them are proper but some improper?

This problem presented itself in the first case that the Court had to judge.[5] In that case enterprises had been selling at prices below those stated in their price lists and the High Authority subsequently passed a decision allowing this price variation within certain narrow limits. It was alleged by the plaintiffs, therefore, that the decision was void as the ground for taking it was so that enterprises in selling below their published price lists would no longer be acting illegally and therefore the High Authority would not be under a duty to fine them. The Court stated:

> 'Even if the decision in question has been partially inspired by the desire to introduce a new system more likely to be observed by enterprises than the previous one, one cannot conclude from this that the purpose of the decision was to legalize infractions previously committed. . . . Even if among the motives which do justify the action of the High Authority there had been an unjustified one, namely the preoccupation to avoid sanctioning defaulting enterprises, the decisions would not, on that account, be vitiated by *détournement de pouvoir*, in as much as they do not infringe upon the essential aim, which is the prohibiting of unfair competitive practices and discriminations.'[6]

The Court in this case, therefore, distinguished between what may be called main and subsidiary motives, and held that where merely subsidiary motives were wrongful this did not vitiate the decision provided that these subsidiary motives 'did not infringe upon the essential aim', which presumably means that they must not make that essential aim unlawful as well.

[1] *Recueil*, vol. 1, at pp. 226–7.
[2] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199, at p. 306.
[3] Ibid.
[4] *The Netherlands' Government* v. *The High Authority* (Case 6/55), *Recueil*, vol. 1, p. 201, at p. 227. *International Law Reports*, 1955, p. 750.
[5] *The French Government* v. *The High Authority* (Case 1/54), *Recueil*, vol. 1, p. 7.
[6] Ibid., at p. 32.

In a later case[1] a decision of the High Authority relating to the compensation system for Belgian coal was challenged. Under the relevant provision of the Treaty[2] the purpose of this compensation system was stated to be to lower the high price of Belgian coal and to enable the Belgian steel industry to compete in the Common Market. The plaintiffs alleged, however, that the real aims of the High Authority when passing a decision lowering the price of Belgian coal were to bring about structural changes in the Belgian coal industry and to avoid difficulties in selling high-priced coal. The Court, although it found these allegations unjustified,[3] applied the same criterion as has been set out above and declared:

> 'Even if an unjustified motive was joined to the motives which, of themselves, justify the action of the High Authority, the decision would not from this fact be vitiated by *détournement de pouvoir* as it does not infringe upon the essential aim of Paragraph 26 of the Convention.'[4]

The allegations which support détournement de pouvoir

In order to prove the existence of a *détournement de pouvoir*, a plaintiff has to compare, on the one hand, the purpose for which a particular power was given to the administrative authority, and, on the other, the purpose with which that power has been used.

In one of the early cases,[5] the plaintiffs were an Italian enterprise. They alleged that the decision of the High Authority allowing enterprises to sell below the prices set out in their price lists[6] had been taken so as to avoid the need to impose fines upon enterprises who were doing this. In their pleadings, the plaintiffs declared:

> 'The High Authority has failed to impose the sanctions prescribed in Article 64 against the enterprises which, prior to the decision here challenged, were selling at prices below their price lists. It had, however, a duty to do this. This failure constitutes a manifest injustice and therefore a *détournement de pouvoir* with respect to those enterprises which have observed the Treaty.'[7]

The plaintiffs by alleging this manifest injustice—*manifesta inguistizia*—as substantiating a claim of *détournement de pouvoir* were adopting an argument which has been accepted by the Italian *Consiglio di Stato* as being valid to establish incompetence—*eccesso di potere*,[8] but never as a means of establishing *détournement de pouvoir—sviamento di potere*. However, the Court, although it did not expressly rule on this point, because the decision

[1] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199.
[2] Convention concerning the Transitional Provisions, para. 26. 2.
[3] *Recueil*, vol. 2, at p. 306. [4] Ibid., at p. 307.
[5] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123; *International Law Reports*, 1955, p. 750.
[6] Decision No. 2–54. [7] *Recueil*, vol. 1, at p. 136.
[8] See Galeotti, *The Judicial Control of Public Authorities in England and Italy*, pp. 147 and 150.

being challenged had already been annulled in a previous case, gave no indication that it did not accept a contention of manifest injustice as, at least prima facie, going to show a *détournement de pouvoir*.[1]

When challenging a later decision of the High Authority[2] which required enterprises to make reports to the High Authority twice a week setting out all sales which were at prices other than those stated in the enterprises' price lists, the same plaintiffs in their pleadings asserted:

'The system for giving information which is introduced by Decision 3–54 is impracticable and therefore illogical. Consequently the system is vitiated by a *détournement de pouvoir*.'[3]

The same type of argument was advanced in a more recent case[4] when the plaintiffs stated:

'It is a generally recognised principle of law that an administrative authority can only exercise its powers by taking clear, coherent, sensible and comprehensive decisions. By using its powers to take an obscure, contradictory, absurd and unintelligible decision, the High Authority has gravely misconstrued the legal purpose behind its powers: it has committed a *détournement de pouvoir*.'[5]

An Italian enterprise in another case[6] sought to base a *détournement de pouvoir* upon what they alleged was a breach of the rules of good administration, and also upon the fact that the High Authority when giving reasons for the particular decision had failed to refute the dissenting opinions of consultative bodies. The validity of these arguments has been considered above.[7]

In a case decided in 1958,[8] the plaintiffs challenged a decision of the High Authority[9] by which they were required to pay a sum exceeding 54 million lire to the fund set up to compensate the Belgian coal and steel industries. The plaintiffs alleged a *détournement de pouvoir* on the grounds that first, the decision had been based upon insufficient reasoning and upon

[1] If manifest injustice of a decision were to support a claim of *détournement de pouvoir* it could only do so on the reasoning that the purpose of the powers given to the High Authority was to act with the intention of ensuring justice, and the High Authority had here acted with another intention. It could, of course, equally well be argued that a manifestly unjust decision could be annulled on the grounds of incompetence by implying a term that the High Authority was only authorized to perform actions that would lead to just results, or, alternatively, that such a decision violated the Treaty by implying the same term as before. In the present case, it should be noted that the plaintiffs were not alleging that the particular decision being challenged was manifestly unjust, but that the failure of the High Authority in the past to fine certain enterprises was unjust, so that the relevance of the contention is, in any event, dubious. [2] Decision 3–54.

[3] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority*, *Recueil*, vol. 1, p. 123 at p. 137.

[4] *Phoenix-Rheinrohr A.G. Vereinigte Hütten und Rohrenwerke* v. *The High Authority* (Case 20/58), *Recueil*, vol. 5, p. 163. [5] Ibid., p. 177–8.

[6] *Industrie Siderurgiche Associate* (*I.S.A.*) v. *The High Authority* (Case 4/54), *Recueil*, vol. 1, p. 177. [7] See p. 189, above.

[8] *Meroni & Cie, Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 9.

[9] The decision was taken on 24 October 1956; it was not given a number.

inaccurate calculations; secondly, that the High Authority had disregarded certain suggestions which the Council of Ministers had made at the time when it approved the setting up of the machinery for the compensation system, and, thirdly, that the High Authority by a Decision No. 14–55, had wrongfully delegated certain of its own powers to organizations in Brussels which were to run the compensation system. The Court held as to the first of these grounds:

'The insufficiency of the reasoning and the failure to publish the data upon which the decision of October 24, 1956, has been based constitute of themselves violations of the Treaty such as to require the annulment of this decision.'

As to the second, having stated that the suggestions of the Council of Ministers had been embodied in six principles and published in a General Report, the Court said:

'It is not necessary, for the purposes of the present action, to examine the legal consequences which these principles, published under these conditions, are likely to involve, as the decision of October 24, 1956, must, for the above mentioned reasons, be annulled.'[1]

As to the High Authority's delegation of its powers, the Court on the particular facts held:

'The delegation of powers made to the organizations in Brussels by Decision No. 14–55 confers upon them a freedom of action which involves a large discretionary power and cannot be held as compatible with the terms of the Treaty.

'The decision of October 24, 1956, is based upon a general decision improperly taken with regard to the Treaty, and must for that reason, also, be annulled.'[2]

It would appear, therefore, although the Court does not say so, and although in its judgment it considers these allegations under the heading of 'Third Ground: *Détournement de Pouvoir*', that the Court is taking the position that *détournement de pouvoir* cannot be proved by such allegations as these and in this, it is suggested, it is correct.

Finally, a plaintiff has even sought to prove *détournement de pouvoir* by seeking to prove that the decision in question had been passed in violation of a substantial procedural requirement and in violation of the Treaty, and that the High Authority was incompetent to pass it. This would end any distinction between the various heads of appeal and not unnaturally the Court summarily rejected the contention:

'The plaintiffs believe . . . that they may prove the other grounds of annulment set out in Article 33 to establish a *détournement de pouvoir*. In their opinion, the Treaty established a legal system by which private enterprises could only admissibly allege

[1] *Recueil*, vol. 4, at p. 36.

[2] Ibid., at p. 47.

the sole ground of *détournement de pouvoir* affecting them. It would be illogical, therefore, they contend to interpret this ground as being merely exceptional and subsidiary.'[1]

This theory must be rejected.

The standard of proof to establish a détournement de pouvoir

As has been stated already, no decision of the High Authority has yet been annulled on the ground of *détournement de pouvoir*, a ground which one plaintiff has referred to as 'the hardest to prove'.[2] It is not thought to be of great value, therefore, to review the several sets of facts which the Court has held not to constitute a *détournement*, many of which are, in any event, of a somewhat complex and technical nature. One case, however, will be used to illustrate the very high standard of proof which the Court requires.

In December 1952 Miranda Mirossevich was accepted by the High Authority as a translator. She was given a month's trial but during this period was only given three simple passages to translate. At the end of the month, the head of the Language Section of the High Authority informed her that her work was not satisfactory and the High Authority, therefore, informed her by a decision dated 8 January 1953 that she could not be offered a post as a translator. Miranda Mirossevich brought an action against this decision of the High Authority[3] alleging, among other things, that this decision was vitiated by a *détournement de pouvoir* on the grounds that the actual decision to remove the plaintiff had been taken by the supervisor and, it was alleged, had been so taken in order that one of the supervisor's friends might take her place. The Court stated:

'The plaintiff has alleged that the decision of January 8, 1953, was vitiated by *détournement de pouvoir*, the real motive for her dismissal being the supervisor's desire to replace her by a friend.

'Without denying that there exists a correlation between the plaintiff's departure and the arrival of the supervisor's friend within the translation service, neither from the fact that the latter effectively replaced the plaintiff, nor from the fact that the decision to dismiss and to appoint were made by the same person, can the Court hold that the proof of *détournement de pouvoir* has been established to the requirements of the law.'[4]

D. *Additional Powers of the Court if a* détournement de pouvoir *or Patent Misconstruction of the Treaty is alleged*

The second sentence of paragraph 1 of Article 33 states that the Court may not review the High Authority's evaluation of the situation based

[1] *Société des Charbonnages de Beeringen and Others* v. *The High Authority* (Case 9/55), *Recueil*, vol. 2, p. 323, at p. 353.

[2] *Società Industriale Metallurgica di Napoli (S.I.M.E.T.) and Others* v. *The High Authority* (Joint cases 36, 37, 38, 40 and 41/58), *Recueil*, vol. 5, p. 331, at p. 346.

[3] *Miranda Mirossevich* v. *The High Authority* (Case 10/55), *Recueil*, vol. 2, p. 365; *International Law Reports*, 1956, p. 627. The action was brought under Article 42 of the Treaty, but the competence of the Court was, nevertheless, still governed by Article 33, para. 1.

[4] *Recueil*, vol. 2, at p. 389.

upon facts or economic circumstances except where the High Authority is alleged to have committed a *détournement de pouvoir* or to have patently misconstrued the provisions of the Treaty or of any rule of law concerning its application. As this provision stands, it might appear to mean that the Court may exercise this power of review in any case where a mere unsubstantiated allegation of *détournement de pouvoir* or of a patent misconstruction is made.

In an early case[1] in which the interpretation of this provision arose, the Court declared:

'It is necessary to stress that the ground of patent misconstruction of the provisions of the Treaty has not been raised by the plaintiffs as a separate ground of appeal, but only with the aim of enabling the Court to examine the evaluation of the situation resulting from the facts and economic circumstances of the present case.

'On this, Article 33 does not require, as concerns the allegation made, that there should be a complete and established proof, which would involve moreover the immediate annulment of the decision on the ground of violation of the Treaty.

'On the other hand, a mere assertion of a patent violation would not be sufficient to grant to the Court the right to review the economic evaluation, without the fear of degenerating this ground of appeal into one of pure formality.

'It is necessary and sufficient that the allegation should be supported by relevant evidence.'[2]

The question of what amounts to a *détournement de pouvoir* has been discussed above,[3] and it is only necessary to consider what meaning is to be attached to the term 'patent misconstruction of the Treaty'. At first sight it would appear that if the Court is required to determine whether the High Authority has patently misconstrued the provisions of the Treaty, it is necessary for the Court, first, to construe the Treaty, and then, secondly, to see how the High Authority has construed the Treaty, and then, finally, to compare the two constructions to see if the High Authority's one is patently wrong.[4] If it is patently wrong, then any decision based upon that misconstruction can, of course, be annulled on the grounds either of incompetence or violation of the Treaty.

In two cases the Court has approached the matter in that way.[5] In these cases the plaintiffs challenged the validity of a decision of the High Authority charging them with sums of over 54 million and over 23 million lire respectively, payable to the compensation fund set up for the benefit of the Belgian coal and steel industries. In their actions, they alleged the existence of a patent misconstruction of the terms of the Treaty. The

[1] *The Netherlands' Government* v. *The High Authority* (Case 6/54), *Recueil*, vol. 1, p. 201.

[2] Ibid., at p. 225.

[3] See pp. 193–200 above.

[4] The distinction between a misconstruction and a patent misconstruction is not one that can profitably be considered in the abstract.

[5] *Meroni & Cie, Industrie Metallurgiche S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 9, and *Meroni & Cie, Industrie Metallurgiche, Società Accomandita Semplice* v. *The High Authority* (Case 10/56), ibid., p. 51. These two judgments are identical on this point.

plaintiffs' argument was that Article 47 of the Treaty provides, subject to certain exceptions as to trade secrets, that the High Authority shall publish such data as may be useful to Governments and to any other interested parties, and further, by Article 5, the High Authority is required to publish the reasons for its actions. They contended that despite these requirements they had not been supplied with any of the data upon which their contributions to the compensation fund were based, and that even after waiting a year and a half they had only received provisional assessments of the amounts to be paid. They, therefore, alleged that the High Authority, by not observing the requirements of Articles 5 and 47 had patently misconstrued the provisions of the Treaty. In its judgment the Court stated:

'By not making public, at least in their general aspects, the reasons for their action, and by not publishing such data, not considered as trade secrets, as is likely to be useful to Governments or to any other interested parties . . . the High Authority has violated Articles 5 and 47 of the Treaty.'[1]

From this it is clear that the Court considers that a patent misconstruction of the Treaty means, in effect, an obvious violation of the Treaty.[2]

In an earlier case,[3] however, the Court adopted a very different interpretation of the meaning of the term 'patent misconstruction of the Treaty' for there it had stated:

'The term "patent" implies that the legal provisions have been misconstrued to such an extent that this misconstruction when compared with the provisions of the Treaty appears to follow from an obvious error in the evaluation of the situation in the light of which the decision has been taken.'[4]

In the particular case in question, the plaintiffs were seeking the annulment of certain decisions of the High Authority[5] which retained maximum prices for coal produced in the Ruhr and in the *Houillères du Nord* and the *Pas-de-Calais*. The arguments put forward in an attempt to show that there had been a patent misconstruction of the Treaty were that by the Treaty the High Authority was only empowered to fix maximum prices 'if it finds that such a decision is necessary to attain the objectives defined in Article 3 and particularly in paragraph (*c*) thereof'[6]—Article 3 (*c*) providing that the Community is to seek the establishment of the lowest prices. The plaintiffs, secondly, sought to show that with the conditions existing in the

[1] *Recueil*, vol. 4, at pp. 33 and 72.

[2] This appears also from the High Authority's defence to the allegation, namely that the duty to publish did not here arise because, it alleged, the information concerned was a trade secret—ibid., p. 23. Although the Treaty would have empowered it to do so, the Court did not here embark upon its own review of the facts and economic circumstances in the light of which these decisions were taken, that is to say, the Court did not review whether the debts as specified in the decisions were in fact owing.

[3] *The Netherlands' Government* v. *The High Authority* (Case 6/54), *Recueil*, vol. 1, p. 201; *International Law Reports*, 1955, p. 750.

[4] *Recueil*, vol. 1, at p. 225.

[5] Decisions Nos. 18–54, 19–54, and 20–54.

[6] Article 61, para. 1 (*a*).

Common Market at the time when these decisions were taken, minimum prices would not be achieved.[1]

If one assumes that the plaintiff's second contention is right, namely, that minimum prices would not be achieved, then, it is suggested, one of four situations may have occurred:

(*a*) The High Authority may honestly have believed that the fixing of maximum prices would produce minimum prices, but as a matter of economics it was mistaken. This means that the High Authority has not misconstrued the Treaty, or in any way passed an invalid decision, but only that it has taken a politically unsound decision; or

(*b*) The power of the High Authority to pass a decision fixing maximum prices only exists, according to the wording of the Treaty, 'if it finds that such a decision is necessary to attain' minimum prices. If, therefore, the High Authority had not so found, it would have had no competence to pass the decision in question, which could have been annulled on the grounds of incompetence; or

(*c*) The Treaty may be read as granting power to the High Authority to fix maximum prices, but nevertheless that power is only to be used for a particular purpose, namely, to obtain the lowest possible prices. If, therefore, the High Authority had used this power for another purpose, the decision would have been void owing to a *détournement de pouvoir*; or

(*d*) The High Authority may have misconstrued the provisions of the Treaty, thinking for example, that the Treaty gave it other powers than in law it did. A patent misconstruction of the Treaty would have occurred and the decision would be able to be annulled on the grounds, most probably, of incompetence or of violation of the Treaty. In its judgment the Court itself said:

> 'In the present case, the "patent" misconstruction could only have occurred if the Court were to discover the existence of an economic situation revealing, *prima facie*, an absence of necessity for the decision taken for the pursuit of the objectives set out in Article 3 of the Treaty, particularly in paragraph (*c*) thereof. . . .
>
> 'The plaintiffs' contention that maximum prices would in fact become the minimum which would stabilize and immobilize prices does not, *prima facie* exclude all necessity, and thereby is not sufficient to constitute a patent misconstruction.'[2]

The Court further found, on the facts of the case, that prices in a free market were tending to rise, and held this to be additional evidence that there had not been a patent misconstruction of the Treaty.[3]

[1] It may at first sight appear illogical to fix maximum prices if one wishes to obtain minimum prices, but the necessity for so doing is soon seen if one considers what would be the effect of fixing minimum prices instead.

[2] *The Netherlands' Government* v. *The High Authority* (Case 6/54), *Recueil*, vol. 1, p. 201, at p. 225; *International Law Reports*, 1955, p. 750.

[3] *Recueil*, vol. 1, p. 226.

Now it appears clear that what the Court was doing here, under the power granted to it by this article, was to study the existing structure of the Common Market and, from that, to see whether, to use the Court's own words, there was '*prima facie* an absence of necessity for the decision'.

The Court was thus, in effect, doing two things. It was taking the words of Article 61 of the Treaty, which state: 'the High Authority may fix . . . maximum prices within the Common Market if it finds that such a decision is necessary to attain' the lowest possible prices, and reading these as: 'the High Authority may fix . . . maximum prices within the Common Market if a situation therein exists such that the fixing of maximum prices is objectively *prima facie* necessary to attain the lowest possible prices.'

Having done this, the Court held that if there did not exist a situation such that the fixing of maximum prices was objectively *prima facie* necessary to attain the lowest possible prices, the above provision would have been patently misconstrued. It appears, however, that in such a case what would have been misconstrued is not the provisions of the Treaty, but rather the existing economic situation.

The Court's interpretation of the words 'patent misconstruction of the Treaty' may at first sight appear surprising. However, an interpretation of these words which holds that the High Authority's construction of the Treaty is to be compared with that of the Court's, ignores the further provisions of Article 33, by which where the High Authority is alleged to have patently misconstrued the provisions of the Treaty, then as an exception, the Court may review the High Authority's evaluation of the economic situation. On the above interpretation this power would be unnecessary and inexplicable.

The situation is reached, therefore, that if the Court is to consider whether the Treaty itself has been patently violated, a power in the Court to review the economic situation is surprising; while if a review of the economic situation is made, one is not, strictly, determining whether the Treaty, but rather whether a given situation, has been misconstrued. It is suggested that there is no way of avoiding this conflict, but that a closer approximation to the meaning of this provision would be obtained if it were conceived not as referring to a situation where there has been a patent misconstruction of the Treaty, but rather to a situation where a patent misapplication of the Treaty has taken place. If, in the case cited above, the Court is regarded as determining whether a provision, which may be applied to a situation in which the fixing of maximum prices is likely to lead to the lowest possible prices, has been rightly applied in a given situation or not, it follows that the first duty of the Court must be to determine the nature of the given situation—viewed in this way the attitude and wording of the Court becomes explicable.

II. Appeals by Enterprises, Associations and Individuals against Executive Actions

Article 33, paragraph 2 of the Coal and Steel Community Treaty states:

'Enterprises or associations referred to in Article 48 may, under the same conditions, bring an appeal against individual decisions and recommendations concerning them or against general decisions and recommendations which they believe vitiated by a *détournement de pouvoir* with respect to them.'[1]

The equivalent provision in the Common Market and Euratom Treaties[2] states:

'Any natural or legal person may bring, under the same conditions, an appeal against decisions of which he is the recipient and against decisions which, although taken under the appearance of a regulation or of a decision addressed to another person, concern him directly and individually.'[3]

This provision extends the right of appeal to the Court to enterprises and associations, but this right is more limited than that given by paragraph 1 of this article to the Council and the member States. It is a provision which, nevertheless, has called forth nearly as much legal argument as paragraph 1 itself.

A. *The Meaning of the Term 'Enterprises and Associations'*

The enterprises which are here being referred to are those 'engaged in production in the field of coal and steel within the European territories of the member States, and also within those European territories[4] for whose foreign relations a member State assumes responsibility'.[5]

The terms 'coal' and 'steel' cover a large number of products which are listed in an annex to the Treaty. In one case,[6] the plaintiffs requested the Court to annul a decision of the High Authority which stated that the plaintiffs could not be excused from paying contributions to the Subsidy Fund set up to subsidize the price of imported iron scrap. One of the

[1] 'Les entreprises ou les associations visées à l'article 48 peuvent former, dans les mêmes conditions, un recours contre les décisions et recommandations individuelles les concernant ou contre les décisions et recommandations générales qu'elles estiment entachées de détournement de pouvoir à leur égard.'

[2] Economic Community Treaty, Article 173, para. 2: Euratom Community Treaty, Article 146, para. 2.

[3] 'Toute personne physique ou morale peut former, dans les mêmes conditions, un recours contre les décisions dont elle est le déstinataire, et contre les décisions, qui, bien que prises sous l'apparence d'un règlement ou d'une décision adressée à une autre personne, la concernent directement et individuellement.'

[4] This refers to the Saar.

[5] E.C.S.C. Treaty, Articles 80 and 79, para. 1. As concerns matters relating to concentrations and monopolies, the term 'enterprises' is extended to mean any enterprise or organization regularly engaged in distribution, other than sale to domestic consumers or to craft industries—Article 80.

[6] *Société des Fonderies de Pont-à-Mousson* v. *The High Authority* (Case 14–59), *Recueil*, vol. 5, p. 445.

plaintiffs' contentions was that they were not an enterprise within the meaning of the Treaty, and, therefore, could not be required to pay.

The list in the annex to the Treaty which defines 'steel', includes 'foundery and other raw pig-iron' within the definition. The plaintiffs, however, made iron castings, which the High Authority agreed were outside the definition of steel, yet in the manufacture of these iron castings the plaintiffs used liquid pig-iron which they made themselves. To determine, therefore, whether the plaintiffs were an enterprise within the meaning of the Treaty, the Court had to determine whether the plaintiffs' liquid pig-iron fell within the term 'raw pig-iron'. Having decided that it did, the Court considered whether the plaintiffs, in making liquid pig-iron as a first step in the production of iron castings, could be held to be 'engaged in an activity of production' of pig-iron within the meaning of the Treaty. That is to say, did the term 'production' mean exclusively the manufacture of a saleable product. Having held that it did not, the Court declared the plaintiffs an enterprise within the meaning of the Treaty and, therefore, liable to pay to the Subsidy Fund.

Paragraph 2 of Article 33 states that enterprises 'may bring an appeal' to the Court. In one case, however, the Luxembourg Government, as an intervening party, sought to have a restriction placed upon this right of appeal.[1] The Government's argument was fully set out and considered by the Court when it stated:

'The Luxembourg Government, however, in its Request to intervene, has affirmed that "the plaintiffs, although falling, in other respects, within the competence of the Community, are not entitled to appeal to the Court having regard to the particular character of the action".

'The Luxembourg Government bases its contention upon the fact that because the action before the Court is solely concerned with a question relating to coal, only an enterprise producing coal, or an association of such enterprises is qualified to bring the action. Indeed, this qualification cannot be possessed by an association of enterprises which, as in the present case, acts, and can only act, in its capacity as an association representing consumers. . . .

'In agreement with the conclusions of the advocate general, there is no provision in the Treaty which requires the particular article made by the producers to be connected with the subject matter of the dispute.

'The silence of the Treaty on this point cannot be interpreted in any manner which would be detrimental to enterprises and associations.

'Consequently, the plaintiffs' right to appeal to the Court in the present case cannot be denied.'[2]

Thus, any enterprise within the definition contained in the Treaty is competent to bring an action.

The associations being referred to in Article 33 are those which 'either

[1] *Groupement des Industries Sidérurgiques Luxembourgeoises* v. *The High Authority* (Joint cases 7/54 and 9/54), *Recueil*, vol. 2, p. 53; *International Law Reports*, 1956, p. 597.

[2] *Recueil*, vol. 2, at pp. 85–86.

permit the properly chosen representatives of the workers and consumers to participate in the direction of these associations, or in consultative committees attached thereto, or in any other way give a satisfactory place in their organization to the expression of the workers' and consumers interests'.[1]

It is stated in the Treaty that the right of enterprises to form associations is not affected by the Treaty.[2] The Court has, therefore, held that the associations referred to in the expression 'enterprises and associations' are associations of such enterprises as fall within the Treaty's definition of enterprise. In so holding the Court said:

> 'The associations referred to in the phrase ["enterprises and associations"][3] can only be associations of enterprises, within the meaning of the word "enterprise" given by Article 80 of the Treaty, for the whole Treaty.
>
> 'In fact, if this were not so, an association would possess the right to bring an appeal which none of its constituent members alone would themselves have been able to bring.
>
> 'In the absence of any contrary indication, the Treaty does not create such a disparity of treatment between an association and the members of which it is composed.'[4]

It follows that an association composed of enterprises that are engaged in the distribution, and not in the production, of coal or steel cannot appeal to the Court. In one case, however, the Court had to deal with the borderline case of an association composed of enterprises some of which were engaged in the production of coal, and so fell within the definition in the Treaty, and some which were not so engaged, and so fell outside that definition.[5] The case turned upon the meaning of the word 'association' in Article 35 of the Treaty,[6] because under that article the plaintiff association had brought to the High Authority's attention that Authority's failure

[1] Article 48, para. 3. It is not clear why Article 33, para. 2 makes reference to the whole of Article 48 as the above sentence is the only one relevant here. [2] Article 48, para. 1.

[3] The Court was here referring to this phrase as it occurred in Article 35, para. 1, but, as the Court goes on to declare, see below, the term must be similarly defined throughout the whole Treaty.

[4] *Groupement des Industries Sidérurgiques Luxembourgeoises* v. *The High Authority* (Joint cases 7/54 and 9/54), *Recueil*, vol. 2, p. 53, at p. 83; *International Law Reports*, 1956, p. 597; repeated in *Association des Utilisateurs de Charbon du Grand Duché de Luxembourg* v. *The High Authority* (Joint cases 8/54 and 10/54), *Recueil*, vol. 2, p. 157, at p. 186.

[5] *Association des Utilisateurs de Charbon du Grand Duché de Luxembourg* v. *The High Authority* (Joint cases, 8/54 and 10/54), ibid., p. 157. Those enterprises falling outside the definition were: *Fédération des Industriels Luxembourgeois, Groupement des Negociants de Combustibles en gros, Société Nationale des Chemins de Fer Luxembourgeois, Monsieur Leon Brasseur, Engineer*, representing *les Usines à gaz du Grand-Duché de Luxembourg.*

The enterprise within the definition was: *Groupement des Industries Sidérurgiques Luxembourgeoises.*

[6] Article 35 empowers State, the Council, enterprises and associations to appeal to the Court for the annulment of the decisions and recommendations of the High Authority which are implied to have been taken as a result of two months' silence on the part of the High Authority after it has been requested to take such decision or recommendation.

to make a decision or recommendation upon a particular matter. In the case before the Court, the same association was seeking the annulment of the decision which the High Authority was deemed to have passed because it had failed to take action within two months.

The Court, therefore, had to consider whether the plaintiffs were an association which had standing to appeal to the High Authority in the first place, that is to say, whether they were an association within the meaning of the Treaty. It found that the objects of the plaintiff association were 'to protect and represent the interests of coal consumers . . .' and 'to give advice upon questions of interest to coal consumers . . .' and then declared:

'For these reasons, and without prejudice to the qualities required for bringing an appeal in application of other articles of the Treaty, the Association des Utilisateurs de Charbon du Grand-Duché is not one of the associations empowered to bring a matter before the High Authority in application of the provisions of Article 35.'[1]

The Court further declared that the fact that one of the constituent enterprises of the association was an enterprise within the definition in the Treaty, did not alter the status of the association.[2]

It is suggested that, despite the reluctance of the Court to commit itself upon this point, as is seen from the above quotation, the term 'association' must have the same meaning throughout the Treaty, and, therefore, that what is stated about the term in Article 35 applies equally to the term when used in Article 33. If this is so, it would appear, on the authority of this case, that the test of whether an association can appeal to the Court is, primarily, whether its articles of association show that it is one concerned with the production of coal and steel. If it is not, then it cannot appeal, and even if it is concerned with the production of coal and steel, it can only appeal if its constituent enterprises could themselves have appealed.[3]

When the Treaty states that 'associations . . . may bring an appeal against individual decisions and recommendations affecting them', it might be assumed that the word 'them' refers back to associations, so that only if the decision or recommendation in question concerned the association as a whole could that association sue. The Court, however, has not accepted this view and has held:

'where there is an appeal brought by an association of enterprises, it is sufficient if the

[1] *Recueil*, vol. 2, at p. 187.

[2] Ibid. The Court's words were: 'The presence, among these members, of the Groupement des Industries Sidérurgiques Luxembourgeoises does not alter this character [of the association], and moreover, this Groupement has already in its own right brought an appeal having the same object [as the present case].' It is suggested, however, that the latter consideration should be quite irrelevant.

[3] There is no authority upon the point of how many of the constituent enterprises need to be enterprises within the meaning of the Treaty. As to the right of an association to bring an action against a decision alleged to be vitiated by *détournement de pouvoir* with regard to one of its constituent enterprises, see pp. 212 et seq. below.

association alleges a *détournement de pouvoir* affecting one or more of the enterprises that are members of the association.'[1]

B. *The Distinction between General and Individual Decisions and Recommendations*

Where a decision or recommendation is an individual one concerning the plaintiff enterprise or association, that enterprise or association may appeal against it 'under the same conditions' as those set out in paragraph 1,[2] but it may only bring an action against a general decision if it believes the decision to be vitiated by a *détournement de pouvoir* with respect to itself. Because of this procedural difference it is vital that general and individual decisions should be clearly distinguished.

The Treaty lays down that individual decisions and recommendations become binding by notification to the parties concerned, whereas general decisions shall take effect automatically upon publication.[3] It cannot from this be argued, however, that every decision that is published is general, or that every one that is notified is individual. In fact, the Court has already held several published decisions to be individual and also directives sent by letter and not published to be general decisions.[4]

On the first occasion when the Court had to determine the nature of a particular decision,[5] it concerned one by which the selling price of coal mined in Belgium was fixed by the High Authority by means of a scale of prices related to the type and grade of the coal in question.[6] The Court stated:

'As respects Decision 22–55, the plaintiffs submit that it is an individual decision. The defendants maintain, on the contrary, that it constitutes a general decision. . . .

'This decision applies to enterprises by reason only of the fact that they are producers of coal, without any other requirement. In the case of a new coal deposit being discovered in Belgium, its products would be required to be sold at the prices fixed by this decision. On the other hand, the territorial delimitation contained in the decision

[1] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123, at p. 139. *International Law Reports*, 1955, p. 886. It is suggested, however, that a limitation must be placed upon this right, namely, that the enterprise could itself have brought the action, for if this is not so, an association, within the meaning of the Treaty, could sponsor a case on behalf of an enterprise that is not within the scope of the Treaty.

[2] For a discussion of the phrase 'under the same conditions' see pp. 215–18 below.

[3] Article 15, paras. 2 and 3. The publication is made in the *Journal Officiel*.

[4] Decisions Nos. 19 to 23–53 were published in the *Journal Officiel* of 13 March 1953 but each regulate one enterprise only. The letter of the High Authority to the Belgian Government of 28 May 1955 was held to be a general decision—*Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199.

[5] Decision No. 22–55, in *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), ibid.

[6] Article 1 of Decision No. 22–55 stated: 'For grades of coal set out in the Schedule annexed to this decision, coal producing enterprises in the Belgian basin when selling within the common market must comply with the prices therein specified.' No enterprise is mentioned by name in the decision.

does not imply any individual character of that decision, and is justified by the fact that the Belgian industry is in need of compensation.

'The fact that Decision 22–55 consists of a detailed and concrete set of rules applicable to different situations, is not contrary to the general character of the decision. . . .

'The fact that the plaintiffs are an association which includes all the enterprises referred to in the decision—and only those—does not alter this conclusion. If it did, a decision could not ever be general where it applied to all the enterprises of the Community if these had formed themselves into one association. The individual or general nature of a decision must be established by reference to objective criteria, so that it becomes impossible to make a distinction according to whether the plaintiffs are an association or an enterprise.'[1]

The statement here that 'the nature of a decision must be established by reference to objective criteria' is valuable, and so is the brief statement later in the same case that 'the character of a decision does not depend upon its form but upon its content'.[2] However, the Court made no attempt finally to define what the objective criteria might be.

In a later case,[3] however, the Court has given the following more general definition:

'General decisions are quasi-legislative acts passed by a public authority and having a binding effect *erga omnes*.'

This definition the Court applied when considering whether a particular decision was general or individual, saying:

'The general character of Decision 13–58 is directly determined by its contents which lay down many normative principles, specify in the abstract the conditions for their application and set out the legal consequences which they entail.

'Decision 13–58 establishes general organizational rules which . . . regulate in an identical fashion an indeterminate number of cases.

'These rules are and will be applicable to any situation which is or which will come within the conditions specified for their application.'[4]

Individual decisions, on the other hand, the Court has stated, partake of the characteristics of private law.[5]

Although, from the above, the distinction between general and individual decisions appears clear, the Court appears not to have been very consistent in applying it. Thus, when the Court was concerned with a decision of the High Authority[6] setting up and regulating the joint sales organizations in the Ruhr, the plaintiffs assumed that the decision was a general one, and this assumption was not challenged by the High Authority, and

[1] *Recueil*, vol. 2, at p. 224. [2] Ibid., at p. 226.

[3] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 113.

[4] *Società Industriale Metallurgica di Napoli* (*S.I.M.E.T.*) *and Others* v. *The High Authority* (Joint cases 36, 37, 38, 40 and 41/58), ibid., p. 331.

[5] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), ibid., p. 113.

[6] Decision No. 5–56.

the point was not mentioned by the Court.[1] In a later action[2] when other decisions of the High Authority further regulating these joint sales organizations in the Ruhr[3] were being considered, the Court held that 'it could not be disputed' that the decisions in question were individual. No reasons for the distinction between the nature of these decisions was stated and none readily come to mind.

An interesting variant of this problem of the nature of a decision arose when the Court was asked to annul a decision of the High Authority that did not exist but was implied to exist owing to the inaction of the High Authority for a period of two months after it had been requested to act.[4] The Court had, therefore, to determine whether this non-existent decision was general or individual.

The Court solved this difficulty by seeing, first, what was the existing situation which the High Authority was impliedly refusing to alter and then deducing, in effect, what decision would have been required expressly to declare this refusal. It was that decision which was being implied and the nature of it could thus be established. The Court stated:

'The implicit negative decision which is deemed to have resulted from the silence of the High Authority can only be considered as a refusal to take the decision requested by the plaintiffs in their letter of July 14, 1954.

'This implicit decision is, therefore, to be deemed to state that there are no grounds for declaring, by means of a reasoned decision, that the Government of the Grand Duchy failed to fulfil one of the obligations incumbent upon it by virtue of the Treaty, when, by the Decree of March 8, 1954, it authorized the *Office Commercial du Ravitaillement* to increase the prices of solid fuel other than household fuel.'

Thus, the decision in question has been deemed to be an individual decision because it only related to a specific activity of a public institution designated by name, i.e. the *Office Commercial du Ravitaillement*.[5]

In the above cases, the appeal against an individual decision has always been brought by the enterprise or association to which that individual decision was addressed. In a recent case,[6] however, the Court had to consider whether a decision which was individual to one enterprise could be challenged by another enterprise adversely affected by it and, if so, whether as regards that other enterprise the decision could be classed as an individual decision, so that all the four grounds of appeal set out in Article 33,

[1] *Société Minières du Bassin de la Ruhr groupées au Sein du Comptoir de Vente du Charbon de la Ruhr 'Geitling' et Comptoir de Vente du Charbon de la Ruhr 'Geitling'* v. *The High Authority* (Case 2/56), *Recueil*, vol. 3, p. 9.

[2] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 89.

[3] Decisions Nos. 16–57, 17–57, and 18–57.

[4] *Groupement des Industries Sidérurgiques Luxembourgeoises* v. *The High Authority* (Joint cases 7/54 and 9/54), *Recueil*, vol. 2, p. 53; *International Law Reports*, 1956, p. 597.

[5] *Recueil*, vol. 2, at p. 87.

[6] *Firma I. Nold, K. G.* v. *The High Authority* (Case 18/57), *Recueil*, vol. 5, p. 89.

paragraph 1 could be alleged. Briefly the facts of the case were that the High Authority by three decisions[1] had authorized an agreement between three Ruhr sales organizations by which they were only to supply coal to those wholesalers who in the previous year had themselves sold within the common market 60,000 tons of coal mined within the Community. The plaintiffs, however, were wholesale coal merchants established in Darmstadt who had not sold 60,000 tons of coal in the previous year as specified so that the Ruhr sales organizations, therefore, refused to supply them. They challenged the original decisions of the High Authority which had authorized the agreement fixing this requirement of the sale of 60,000 tons, and alleged, *inter alia*, that the decisions had been passed in violation of a substantial procedural requirement. This ground of appeal could only be accepted by the Court if the plaintiffs were entitled to regard the High Authority's decisions as 'individual decisions concerning them' within the meaning of Article 33, paragraph 2 of the Treaty, for if the decisions were general decisions the plaintiffs could only allege a *détournement de pouvoir* with respect to them.

The Court held, first, that, as regards the three Ruhr sales organizations themselves the decisions were individual and then declared:

> 'Owing to the silence of the Treaty on this subject, one cannot admit that a decision, which is individual with regard to the enterprises to which it is addressed, can, at the same time, be considered as general with regard to third parties.'[2]

The plaintiffs could, therefore, also regard the decisions as individual decisions and could allege against them all the four grounds set out in paragraph 1 of Article 33.

C. The Right of Enterprises and Associations to challenge General Decisions of the High Authority

By Article 33, paragraph 2, although enterprises and associations may challenge individual decisions upon any of the four grounds set out in paragraph 1, yet their right to challenge general decisions and recommendations is limited to challenging those which they believe vitiated by a *détournement de pouvoir* with respect to them. This limitation upon the right of challenge of general decisions was greatly reduced by one judgment of the Court[3] and the judgment amounts to an important piece of judicial legislation.

The facts of the case were that certain organizations had been set up in Brussels by the High Authority by a general Decision No. 14–55 and these

[1] Decisions Nos. 16–57, 17–57, and 18–57.

[2] *Recueil*, vol. 5, at pp. 112–13.

[3] *Meroni & Cie, Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 9.

organizations were to run the financing and distribution of a subsidy upon imported iron scrap. Enterprises were to pay a levy to these organizations but if they failed to do so the organizations could report the defaulting enterprises to the High Authority which could then pass a decision demanding the sum owed. This decision would be an individual decision and would have executory force. The plaintiffs failed to pay their levy and were duly reported to the High Authority, which on 24 October 1956 passed a decision demanding the sum of nearly 55 million lire.

The plaintiffs challenged this individual decision on three of the four grounds allowed by paragraph 1, the main burden of their case being that the entire system set up by Decision 14–55 of establishing the organizations in Brussels and empowering them to require enterprises to pay a levy to the Subsidy Fund was illegal. Decision 14–55, however, was a general decision, and by the words of Article 33, paragraph 2 an enterprise could only challenge it on the grounds of a *détournement de pouvoir* with regard to itself, whereas the plaintiffs wished to challenge it upon others of the grounds set out in paragraph 1. A further difficulty was that the time period for bringing the appeal against this general decision had in any event long since passed.[1] The decision of the Court was as follows:

'Decision 14–55 of March 26 has not been challenged directly, but only by way of an appeal against the decision of October 24, 1956, which is of an executory nature.

'Whereas the decision of October 24, 1956, is an individual decision affecting the plaintiffs, Decision No. 14–55 of March 26, 1955, is a general decision upon which the decision of October 24, 1956, has been based.

'In order to determine the ability of the plaintiffs, in support of their appeal against the individual decision, to rely upon the irregularity of the general decision upon which it has been based, it is necessary to discover whether the plaintiffs are able to challenge that decision after the expiration of the time period set out in the last paragraph of Article 33, and further, whether, in challenging that general decision they may rely not only upon the ground of *détournement de pouvoir* affecting them, but also upon the four grounds of annulment that are set out in the first paragraph of Article 33.

'In agreement with the conclusions of the advocate general, the Court holds that a general decision which has been taken irregularly cannot be enforced against an enterprise and money payments authorised by that decision cannot be deducted from that enterprise.

'Article 36 of the Treaty states that in support of an appeal against a decision of the High Authority imposing pecuniary sanctions or daily penalty payments:

> 'the plaintiffs, in support of such an appeal, and under the terms of the first paragraph of Article 33 of the Treaty, may rely upon the irregularity of the decisions and recommendations which they are charged with having violated.'

'There is no occasion to hold this provision of Article 36 to be a special provision applicable only to the case of pecuniary sanctions and daily penalty payments, but as

[1] By Article 33, para. 3, appeals brought under Article 33 must be lodged within one month of the publication or notification of a decision.

the application of a general principle, of which Article 36 is its application to the special case of an appeal *de pleine juridiction.*

'One cannot argue, from the express reference in Article 36, that the application of this principle is excluded in any case where it is not expressly mentioned, for the Court has decided in its judgment in Case No. 8–55[1] that such a mode of arguing is not admissible unless no other interpretation appears to be appropriate and to be compatible with the express wording of the provision, with its whole context, and with its underlying purpose.

'Any other interpretation would render the exercise of the right of appeal granted to enterprises, and to associations of enterprises that comply with Article 48, difficult if not impossible, for those enterprises and associations would be required to discover in every general decision as soon as it was published those provisions which possibly at some future time might occasion loss or damage to them, or which might be considered as vitiated by *détournement de pouvoir* with respect to them.

'It would encourage enterprises and associations to allow those pecuniary sanctions or daily penalty payments prescribed in the Treaty to be imposed upon them in order to be able to take advantage of Article 36, by which they would then be able to bring into issue the irregularity of those general decisions and recommendations which they would be accused of not having obeyed.

'When, after the expiration of the time limit set out in the last paragraph of Article 33, a plaintiff is challenging an individual decision, he may avail himself of the irregularity of general decisions and recommendations upon which that particular individual decision has been based. This, however, cannot lead to the annulment of the general decision but only of the individual decision to which it gave rise.

'The Treaties establishing the European Economic Community and Euratom expressly adopt a similar interpretation when they set out in Articles 184 and 156 respectively that

> "notwithstanding the expiration of the time limit set out in Article 173, paragraph 3 (or, in the case of Euratom, Article 146, paragraph 3) any party in any action challenging a regulation of the Council or of the Commission may rely upon the grounds set out in Article 173, paragraph 1 (or, in the case of Euratom, Article 146, paragraph 1) when challenging that regulation before the Court of Justice."

'These particular articles, without providing a conclusive argument, support the above reasoning by showing that it is also accepted by the draftsmen of these new treaties.

'The annulment of an individual decision upon the grounds of the irregularity of the general decisions upon which it has been based, does not alter the provisions of that general decision except to the extent to which those provisions have been made more specific by the individual decision that has been annulled.

'In challenging an individual decision that affects them, any plaintiffs are entitled to rely upon the four grounds of annulment set out in the first paragraph of Article 33.

'Therefore, nothing prevents a plaintiff when bringing an appeal against an individual decision from alleging the four grounds of annulment set out in the first paragraph of Article 33 so as to challenge the regularity of the general decisions or recommendations upon which that individual decision has been based.'

[1] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199.

Meaning of the words: 'Under the same Conditions'

Article 33 grants to enterprises and associations the right under the same conditions to appeal against individual decisions and recommendations concerning them or against general decisions and recommendations which they believe vitiated by a *détournement de pouvoir* with respect to them.

The phrase 'under the same conditions' is a reference back to paragraph 1 of this article which, it will be recalled, granted a right of appeal to States and the Council of Ministers upon the four grounds there specified. It is clear, therefore, that these same four grounds can be alleged by enterprises and associations against individual decisions concerning them. However, paragraph 1 also states that when the High Authority is alleged to have committed a *détournement de pouvoir* or to have patently misconstrued the provisions of the Treaty, the Court may review the facts and economic circumstances in the light of which the decision in question was taken.

Two questions arise: first, whether enterprises and associations when challenging individual decisions concerning them can allege not only the four grounds of appeal set out in paragraph 1, but whether they can also allege that the High Authority has patently misconstrued the provisions of the Treaty; and secondly, if they do allege either a *détournement de pouvoir* or that the Treaty has been patently misconstrued, whether the Court can review the facts and economic circumstances in the light of which the decision was passed, as it could have done if the same case had been brought by a member State instead of by that enterprise or association. There is no authority upon these points, but it would appear that a choice will have to be made between the following arguments.

One is that in the phrase 'enterprises and associations may, under the same conditions, bring an appeal' the words 'under the same conditions' refer only to the actual bringing of an appeal. Now the only part of paragraph 1 which governs the bringing of an appeal is its first sentence which sets out the four grounds upon which an appeal may be brought. The second sentence of paragraph 1, which refers to the Court's power in certain circumstances to review the economic situation, governs the Court's competence once an appeal has in fact been brought. It can be held, therefore, that this power, because it does not affect the actual initial bringing of an appeal, is not to be incorporated into the phrase 'may, under the same conditions, bring an appeal'.

Alternatively, it can be argued that the words 'may . . . bring an appeal' are not to be construed so narrowly as to apply merely to the submission of the Request to the Registry—which strictly is all that is required to bring an appeal—but that they must be construed as referring to all the stages of procedure. If, in fact, an enterprise brings an appeal alleging a

détournement de pouvoir and the Court cannot consider the economic situation, as it could if another appeal on the same facts had been brought by a member State, then, it can be contended, it is twisting the use of words to suggest that the two cases are being brought 'under the same conditions'.

Furthermore, there are no other indications in the Treaty that enterprises and associations when challenging individual decisions concerning them are to be placed at a disadvantage, and particularly not one which would in many cases require the enterprise's home State also to appeal on the very same facts, in which second appeal the Court could review the economic situation.

Finally, it will be recalled that when the Luxembourg Government sought to impose a limitation upon the right of enterprises to appeal to the Court by arguing that only enterprises producing coal could challenge a decision relating to coal, the Court declared:

> 'The silence of the Treaty on this point should not be interpreted to the detriment of enterprises and associations.'

It may well be held that this statement embodies a general principle.

For these reasons it is suggested, that the phrase 'under the same conditions' implies that when a *détournement de pouvoir* is alleged against an individual decision the Court has the same power to review the economic situation as it would have in an appeal brought under paragraph 1 of this Article.[1] If this is so, then one has to consider whether enterprises and associations when challenging individual decisions can also allege that the High Authority has patently misconstrued the provisions of the Treaty and by making this allegation whether they confer upon the Court the same power of making this review as it would have if the case were being brought under paragraph 1.

It must be noted first, that, although under paragraph 1 member States and the Council can clearly allege a patent misconstruction of the Treaty, this allegation is not, in terms, one of the four grounds upon which a decision or recommendation can be challenged. That is to say, this allegation of a patent misconstruction is not a separate, and fifth ground of appeal, but is included within one or more of the four grounds specified.[2]

If therefore, as is suggested, the term 'under the same conditions' means 'on the same grounds' then it is suggested that enterprises and associations, by being empowered to allege against individual decisions these four

[1] In the semi-official translation of the Treaty prepared by the British Iron and Steel Federation in collaboration with the High Authority the phrase *dans les même conditions* is translated not as 'under the same conditions' but as 'on the same grounds'. It will have been seen from the above discussion that this is not only a rather free translation of the French, but one that is both wrong and misleading.

[2] It is an attenuated form either of violation of the Treaty, or of incompetence.

grounds of invalidity must, *ipso facto*, be empowered also to allege a patent misconstruction of the Treaty.

Finally, if, as has also been suggested, the term 'under the same conditions' implies that the Court can review the economic situation when a *détournement de pouvoir* is alleged, there appear to be no logical grounds for making a distinction between the effect of making an allegation of *détournement de pouvoir* and the effect of making one of a patent misconstruction.

The phrase 'under the same conditions', however, produces a still further difficulty. As paragraph 2 of Article 33 stands, it appears that enterprises and associations, may 'under the same conditions' appeal against individual decisions affecting them and 'under the same conditions' appeal also against general decisions which they believe vitiated by a *détournement de pouvoir* affecting them.

The plaintiffs in one case,[1] therefore, argued, in effect, that because, when it refers to individual decisions the phrase 'under the same conditions' means 'on any of the four grounds set out in paragraph 1', the phrase must also have the same meaning when it refers to general decisions alleged to be vitiated by a *détournement de pouvoir* with respect to the plaintiffs. That is to say, that as soon as such a *détournement de pouvoir* has prima facie been established, all the other grounds of appeal are also open to the plaintiffs. The Court, however, rejected this contention, saying:

'If the plaintiff's contention were correct, enterprises would have as extensive a right to appeal as that of the States and of the Council, and it would be inexplicable why Article 33, instead of simply equating the appeals of enterprises to those of States or of the Council, has introduced a very clear distinction between individual decisions and general decisions, and has limited, as far as enterprises are concerned, the annulment of general decisions to the sole ground of *détournement de pouvoir* affecting those enterprises. The insertion 'under the same conditions' cannot be interpreted as meaning that the enterprises after having established a *détournement de pouvoir* affecting them, have the right to allege the other grounds of annulment as well, because, when a *détournement de pouvoir* affecting them has been established, the annulment of the contested decision must follow and does not have to be pronounced on other grounds.'[2]

This decision may have done one of two things. The Court may, in effect, be saying that appeals being brought against general decisions may still be brought 'under the same conditions' but that those words, as here used, do not imply 'on the grounds set out in paragraph 1'. Alternatively the Court may in effect have stated that the words 'under the same conditions' refer only to appeals against individual decisions. If the former is the case, then the words 'under the same conditions' must mean something and if, because of the context, they do not mean 'on the same grounds' then, it is suggested that they must still carry their other meaning—

[1] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199.
[2] Ibid., at p. 226.

namely that the Court is to hear the case with the same powers as if the case had been brought under paragraph 1, so that it can review the economic situation.

If the words do not apply to appeals against general decisions, then an appeal by an enterprise or association against a general decision deemed to be vitiated by a *détournement de pouvoir* will have to be judged by the Court with no review of economic facts. This may mean that where an enterprise has appealed against a general decision and lost, its home State, on the self same facts and with the same allegations, may appeal and, because it is appealing under paragraph 1, and not paragraph 2, the Court will be able to review the economic situation and the State may succeed.

It is suggested that an interpretation which leads to this position cannot be correct, and that therefore, the alternative interpretation by which the Court can review the economic situation has to be adopted.

In the light of all the above, therefore, it is submitted that under paragraph 2 enterprises and associations when challenging individual decisions which affect them may allege any or all of the four grounds set out in paragraph 1, and if the High Authority is alleged to have committed a *détournement de pouvoir* or to have patently misconstrued the provisions of the Treaty or of a rule of law relating to its application, the Court may review the High Authority's evaluation of the situation based on economic facts and circumstances which led to such decision or recommendation. Further, that enterprises and associations may appeal against general decisions or recommendations which they believe to be vitiated by a *détournement de pouvoir* affecting them, and that the Court when considering the appeals has the above power to review the High Authority's evaluation of the situation.

D. The Grounds of Appeal

No difficulties have been encountered concerning the right of enterprises and associations to challenge individual decisions concerning them. When, however, they have sought to challenge general decisions which they believe to be vitiated by *détournement de pouvoir* with respect to them, they have been met with some strange arguments from the High Authority.

The first point taken by the High Authority was that a request merely alleging, albeit with supporting evidence, a *détournement de pouvoir* was inadmissible. It put forward this contention in its defence to an action brought by an association:[1]

'The plaintiffs do not possess the right to bring an appeal because they have not set out the proof of the existence of a *détournement de pouvoir* with respect to them. It is not sufficient that the plaintiffs allege the existence of a "*détournement de pouvoir* with

[1] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123; *International Law Reports*, 1955, p. 886.

respect to them". The appeal is only admissible if this *détournement de pouvoir* has actually been committed.'[1]

This contention is not understood. One can only speak about a *détournement de pouvoir* having 'actually been committed' if the Court in a judgment has declared this to be so, for without a judgment the matter has not been proved. As the bringing of a case must precede the judgment of the Court, the High Authority's argument appears to have no meaning. At any rate the Court rejected the High Authority's contention, holding:

'By Article 33, paragraph 2 of the Treaty, enterprises or associations of enterprises "have the right of appeal . . . against general decisions . . . which they *deem* to involve a *détournement de pouvoir* affecting them". According to this clearly formulated provision, an appeal will be admissible from the moment that the plaintiffs formally allege that there exists a *détournement de pouvoir* affecting them. . . .

'The Court holds that the Treaty does not provide for any additional requirement for the admissibility of an appeal, as for instance the proof that a *détournement de pouvoir* affecting the plaintiffs was actually committed. This proof will be necessary to establish that the case is well-founded—but this belongs to the examination of the merits of the case and does not affect its admissibility.'[2]

The High Authority sought in a later case[3] to place a second restriction upon an enterprise's right to challenge a general decision. The Court summarized this contention in the judgment:

'The views of the parties differ upon what is the exact effect of Article 33 of the Treaty concerning the admissibility of certain grounds alleged by the plaintiffs against these general decisions.

'The defendants maintain that an enterprise can only allege *détournement de pouvoir* affecting them if the High Authority has disguised, under what appears to be a general administrative act, an individual decision "affecting" that enterprise.'[4]

This contention the Court also rejected:

'A disguised individual decision is still an individual decision. . . . The Court is of the opinion that Article 33 clearly states that associations and enterprises can challenge not only individual decisions but also general decisions in the proper sense of that term.'[5]

The meaning of the phrase 'A Détournement de Pouvoir *with Respect to them'*[6]

Paragraph 2 states that enterprises and associations may challenge general decisions and recommendations which they deem to be vitiated by a *détournement de pouvoir* with respect to them. It is necessary, therefore, that the words 'with respect to them' should be interpreted.

[1] *Recueil*, vol. 1, at p. 133. [2] Ibid., at p. 138.
[3] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199. [4] Ibid., at p. 225. [5] Ibid., at p. 226.
[6] *Une détournement de pouvoir à leur égard.* The High Authority translates this as 'an abuse of power *affecting them*'. It also translates the words, in the same paragraph *les concernant* as 'affecting them'. It is suggested that the translation in the text is to be preferred.

The High Authority in one case[1] when referring to this expression, argued:

'The *détournement de pouvoir* here referred to presupposes that the decision being challenged is only general in appearance while in reality it individually affects the one or more plaintiff enterprises—the High Authority having thus used its power with a purpose other than that specified by the Treaty.'[2]

As the decision being challenged in that case had already been repealed in an earlier action,[3] the Court refused to rule upon the meaning of this phrase.[4] However, when, in a subsequent case the same words again came up for consideration, the Court declared:

'The phrase "with respect to them" has no other meaning than that of the words which express it, namely that the decision affects that enterprise which is the object, or at any rate, the victim, of the alleged *détournement de pouvoir*.'[5]

The word 'them' in the phrase, 'a *détournement de pouvoir* with respect to them' refers back to the enterprises and associations. The point arose, therefore, whether, before an association could appeal against a general decision, the *détournement de pouvoir* has to be with respect to that association as a whole or whether an association could bring a case where the *détournement de pouvoir* was merely with respect to one of its constituent enterprises. The Court has taken the latter view, and has declared:

'In the case of an appeal brought by an association of enterprises, it is sufficient if the association alleges a *détournement de pouvoir* affecting one or more of the enterprises that are members of the association.'[6]

It emerges from the above that paragraph 2 of Article 33 has been interpreted in such a way as, in effect, to make it read:

'Enterprises, or associations referred to in Article 48, paragraph 3, may bring an appeal against individual decisions and recommendations concerning them upon any one or more of the grounds set out in paragraph 1, and in respect of such appeals the Court shall have the same powers as if they had been brought under paragraph 1. Further, enterprises and associations may on the sole ground of *détournement de pouvoir* bring an appeal against general decisions and recommendations which they believe vitiated by a *détournement de pouvoir* with respect either to themselves or to one of their constituent enterprises.'

[1] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123.

[2] Ibid., at p. 133.

[3] *The French Government* v. *The High Authority* (Case 1/54), ibid., p. 7.

[4] Later in the judgment, however, the Court clothed the phrase with a certain mystery when it declared, concerning its earlier annulment of certain decisions of the High Authority: 'No new ground has been put forward which could bring the Court to another conclusion, whatever interpretation one gives to the phrase *détournement de pouvoir à leur égard*, in Article 33 of the Treaty.' *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), ibid., p. 123, at p. 140.

[5] *Fédération Charbonnière de Belgique* v. *The High Authority* (Case 8/55), *Recueil*, vol. 2, p. 199, at p. 226.

[6] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123, at p. 139.

III. Trends in the Judgments of the Court

Out of the above wealth of decisions, certain trends in the reasoning of the Court and certain assumptions can be noted. Principally one observes the extreme care with which the Court examines the various alternative interpretations of the Treaty provisions which are urged upon it. Again, although the Court has rejected so many of these interpretations, in its own rulings upon the meaning of Article 33 of the Coal and Steel Community Treaty there is always discernible the assumption that the main object of that provision was to provide legal rights of appeal against executive action, and, thus, that the Court's duty, far from limiting these in any way, is to extend them in any case where such extension is required.

Thus, it will be recalled that the Court willingly extended the right granted to enterprises by the Treaty to appeal against decisions of the High Authority so as to enable them to appeal against decisions of one of the administrative bodies set up by that Authority to run a subsidy fund,[1] and used the following very significant wording to express this extended right:

> 'In order not to deprive enterprises of the benefit of the protection which Article 33 of the E.C.S.C. Treaty has granted to them, it must be admitted that the decisions taken by the C.P.F.I. . . . are equivalent to decisions of the High Authority and are, therefore, subject to an appeal for annulment under the conditions set out in Article 33.'[2]

Also, in order to assist enterprises, the Court has allowed them, when appealing against an individual decision affecting them, to appeal against the general decision under which that individual one has been passed[3] as a ground for arguing that the individual decision was invalid.[4] The importance of this ruling as an indication of the Court's determination to uphold the rights of enterprises is clearly seen when one considers, first, that the Court allowed the appeal against the general decision to be brought on all the four grounds set out in Article 33, paragraph 1, whereas the Treaty only expressly grants a right to enterprises to challenge general decisions on the sole ground of their being vitiated by a *détournement de pouvoir* with respect to them,[5] and secondly, that the appeal was allowed outside the one month time-period laid down for challenging any decisions.[6]

The judgments further show the great importance which the Court

[1] *Société Nouvelle des Usines de Pontlieue-Aciéries du Temple* (*S.N.U.P.A.T.*) v. *The High Authority* (Joint cases 32/58 and 33/58), *Recueil*, vol. 5, p. 275; see p. 183 above.

[2] Ibid., p. 298; see p. 184 above.

[3] *Meroni & Cie, Industrie Metallurgiche, S.P.A.* v. *The High Authority* (Case 9/56), *Recueil*, vol. 4, p. 9.

[4] This right of appeal, of course, does not allow the general decision to be annulled.

[5] E.C.S.C. Treaty, Article 33, para. 2.

[6] Ibid., para. 3.

places upon reasons being given to support decisions, and it has even gone to the extent in one case[1] of declaring a decision void and non-existent for lack of reasons.[2]

Again, as an indication of the possible future influence of the Court, it is worth recalling an interesting development in one of the cases[3] where an Italian enterprise sought to prove a *détournement de pouvoir* by the means open to it under its own municipal law, namely by proving *illogicita manifesta* or *manifesta inguistizia*, and this manner of proof was accepted by the Court.[4] As the term *détournement de pouvoir* must have the same meaning throughout the Community regardless of the nationality of the plaintiff, it would appear that any plaintiff can allege these grounds even where they are not recognized by that plaintiff's own municipal law. A new body of unified European law which is the sum total of the national laws of member States may thus tend to be developed.

Finally, of course, if at any time Great Britain decides to join any of the communities, it is the European Court of Justice, employing the concepts—a little strange to British ideas—which we have been considering that would have jurisdiction over British industry, and, far more important, over Her Majesty's Government.

[1] *Société des Usines à Tubes de la Sarre* v. *The High Authority* (Joint cases 1/57 and 14/57), *Recueil*, vol. 3, p. 201.

[2] See pp. 190–92 above.

[3] *Associazione Industrie Siderurgiche Italiane* (*ASSIDER*) v. *The High Authority* (Case 3/54), *Recueil*, vol. 1, p. 123.

[4] See pp. 197–8 above.

NUCLEAR LIABILITY: THE GENERAL PRINCIPLES OF LAW AND FURTHER PROPOSALS*

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I. Introduction

It is one of the truisms of the age, none the less important for its frequent repetition, that the world is being filled with an ever-growing population, requiring an ever faster rate of industrialization to support an adequate standard of living. In an effort to meet this demand, many countries have come to include proposals for the exploitation of nuclear energy in their programmes for civil and industrial development.[1] This change from accepted fuels, such as coal and oil, to specially processed fissile materials, seems likely, however, to entail legal repercussions quite as profound as those which accompanied the first transition to the mechanized factory system. A variety of factors, moreover, suggests that future developments in this field will manifest themselves particularly on an inter-State basis, and result in a substantial modification of international no less than of municipal law. Many of the ultimate implications of these developments can only be glimpsed at this stage. However, it seems both possible and useful to try to examine in advance some of the basic problems which international law appears bound to encounter before very long.

Just as the Industrial Revolution required the combined efforts and joint capital of the existing national community, so the task of the full exploitation of atomic energy, like its very discovery, has summoned up the united skill and resources of the enlarged community of nations. Thus the leading atomic powers, the Soviet Union, the United States and the United Kingdom, played a prominent part in establishing the International Atomic Energy Agency and have all subsequently agreed to supply it with special fissionable materials.[2] Specifically designed to 'accelerate and enlarge

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[1] The periodical *Nuclear Power* (January 1960), p. 82, contains a country-by-country survey; see also *The Economic Application of Atomic Energy: Power Generation and Industrial and Agricultural Uses* (1957), a report to the Economic and Social Council of the United Nations following the replies of Member Governments to a United Nations questionnaire; Bhabha, 'The Need for Atomic Energy in the Under-developed Countries', *United Nations Peaceful Uses of Atomic Energy, Proceedings of the Second International Conference* (Geneva, September 1958), vol. 1, p. 395.

[2] International Atomic Energy Agency, *Annual Report to the General Assembly*, 1958–9; for the United Kingdom see, *Exchange of Notes Between The United Kingdom and the International Atomic Energy Agency Relating to the Supply of Enriched Uranium* (1959), Cmd. 809. This provides inter alia that, 'mutually satisfactory arrangements for the protection of the . . . United Kingdom and the (United Kingdom Atomic Energy) Authority against third party liability shall be made before delivery of any part of the material takes place'.

the contribution of atomic energy to peace, health and prosperity throughout the world',[1] the Agency operates on a number of fronts: it participates in the United Nations expanded programme of technical assistance; it organizes the exchange of scientists and of research information; and it is drafting a series of model practice codes which are expected to be widely adopted.[2] The Soviet Union, for its part, has concluded a network of bilateral treaties, chiefly with the countries of eastern Europe, and has established an international research institute.[3] In what is described as a 'rough and ready' but nevertheless 'conservative' estimate, it has been calculated that the United States will provide goods worth between one and one and a half billion dollars to the countries of Euratom before 1970.[4] The United Kingdom, either through the United Kingdom Atomic Energy Authority or through private consortia, has also contracted to supply atomic fuels and reactors to Italy, Japan and Spain. The Japanese reactor will cost £34 million in construction costs alone.[5] It is not surprising, therefore, that the growing international trade in nuclear goods has been characterized as essentially a problem in foreign exchange, requiring the negotiation by Governments of extensive credit facilities.

Besides the supply of capital on an international scale, the need has also arisen more crucially to provide adequate public safeguards in order to forestall accidents, a matter chiefly of scientific calculation, and to minimize them in case they should, nevertheless, occur. Although one authority has declared that 'A reactor can, by no stretch of the imagination, produce any amount of energy that is at all comparable to an atomic bomb',[6] it has also been officially admitted that there is no way of rendering a reactor completely safe. 'We must recognise that the only way to be absolutely safe is not to build a reactor at all.'[7] In practice, since 1945 a commendably high

[1] Article II, Statute of the International Atomic Energy Agency.

[2] International Atomic Energy Agency, *Programme and Budget for 1959* (August 1958).

[3] See Larin, 'International Co-operation on the Peaceful Uses of Atomic Energy', *Soviet Yearbook of International Law* (1958), p. 371; Emelyanov, 'International Cooperation by the U.S.S.R.', *Proceedings of the Second International Conference* (Geneva, September 1958), vol. 1, p. 359; and Ginsburgs, 'The Soviet Union and International Co-operation in the Peaceful Use of Atomic Energy', *American Journal of International Law*, 54 (1960), pp. 605–14. The Statute of the Joint Institute for Nuclear Research is contained in *Legal Series No. 1, Multilateral Agreements* (published by the International Atomic Energy Agency, 1959), p. 29.

[4] Allen, 'Atomic Energy and World Trade', *Vanderbilt Law Review*, 12 (1958), p. 51 at p. 60. The United States has also entered into a large number of bilateral treaties for co-operation and assistance; see von Mehren, 'Agreements for Co-operation: The United States Bilateral Program', *Progress in Nuclear Energy, Series X, Law and Administration* (ed. Marks, 1959), p. 198.

[5] *Agreement Between the United Kingdom and Italy For Cooperation In The Peaceful Uses of Atomic Energy* (1958), Cmd. 349; *Agreement Between The United Kingdom and Japan For Co-operation In The Peaceful Uses of Atomic Energy* (1958), Cmd. 625; and *The Times*, 23 December 1959 and 20 January 1960.

[6] Teller, 'Reactor Safety Considerations', *Atomic Energy—The New Industrial Frontier* (1955), p. 75 at p. 76.

[7] Dr. McCullough, Chairman of the United States Advisory Committee on Reactor Safety, *Management, Economics and Technology for the Atomic Industry* (published by the Atomic

safety record has been maintained, due to some extent to the limited number of installations in operation. As this number starts to rise, fresh problems will occur in connexion with the transport of radioactive materials, the disposal of dangerous wastes and the use of nuclear-powered ships. To what extent may a State control, and, if necessary, prohibit these activities which may threaten persons and property from outside the accepted bounds of national jurisdiction?[1] In relation to the adequacy of the safety measures hitherto adopted, it may be pointed out that one bomb was released 4 miles off target during the Bikini experiments conducted by the United States in 1956, even after innumerable rehearsals.[2] Lest this danger seem one particularly related to atomic weapons, it may be recalled that after the 1957 Windscale accident in Cumberland two official inquiries were held. Both reports contained severe criticisms of the way in which the United Kingdom Atomic Energy Authority conducted its operations, particularly from the standpoint of public safety.[3]

The damage done on that occasion was fortunately limited to property. However, the United States Atomic Energy Commission carried out tests in 1957 to determine the full range of possible harm from a typical reactor. The conclusion reached was that substantial injuries might be caused to as many as 43,000 people and that property damage might amount to $7 billion.[4] The possibility of damage being done to food supplies at a distance of 380 miles (600 kilometres) was also reported at the 1958 Geneva Conference on the Peaceful Uses of Atomic Energy.[5] The question thus naturally arises as to what legal principles should be adopted to regulate responsibility for damage stemming from a nuclear reactor, particularly where a foreign element by way of victim or supplier is involved. In view

Industrial Forum, 1956), at p. 173. The passage continues: 'Let me warn you that we must expect accidents. Much as I would like to, I cannot believe we can be wise enough to avoid all accidents completely.'

[1] Since states will presumably wish to act before the anticipated danger occurs, international tribunals may have to deal with the hitherto little-touched question of injunctive relief. On this issue and the impact of nuclear activities on the law of the sea generally, see Hydeman and Berman, *International Control of Nuclear Maritime Activities* (1960).

[2] *New York Times*, 16 June 1956, p. 1.

[3] *Accident At Windscale No. 1 Pile On 10th October, 1957*, Cmd. 302; *Report Of The Committee Appointed By The Prime Minister To Examine The Organisation of Certain Parts Of The United Kingdom Atomic Energy Authority*, Cmd. 338; *Report Of The Committee Appointed By The Prime Minister To Examine The Organisation For The Control Of Health And Safety In the United Kingdom Atomic Energy Authority*, Cmd. 342. See also *The Economist*, 16 November 1957, p. 610. For a critical account of the procedures adopted by various national authorities, see the series of articles by Muldoon, 'Alice in Nuclear Energy Land', *Massachusetts Law Quarterly*, vol. 42, Nos. 3 and 4; vol. 43, No. 2; and vol. 44, No. 1.

[4] United States Atomic Energy Commission, *Report on Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants* (1957).

[5] Cited in a paper presented by the Royal Netherlands Academy of Sciences, 'International Aspects of Radioactive Contamination in Western Europe and the Necessity for International Control Arising from It', *Proceedings of the Second International Conference* (Geneva, September 1958), vol. 1, p. 366, at 371.

of the unparalleled extent of possible damage, can insurance cover be provided solely on the existing national basis? What right of recourse, if any, will be available against a foreign supplier who has relinquished control of an item apparently constructed with negligence? Although the two latter issues have been responsible for the bulk of international activity to date, the more substantial question of legal responsibility also needs to be examined in the light of past experience relating to responsibility for industrial and other causes of damage.

Whatever the position in earlier law, modern legal systems have shown a uniform tendency to make liability dependent on fault; a breach, in English terminology, of the duty of reasonable care owed to those one may, or ought to, anticipate will be injured by a failure to observe that standard of care. If, for example, a man drives his car carelessly, then on elementary and accepted principles he is liable for any consequential harm. Where, on the other hand, he relies on the negligent advice and workmanship of his independent contractor—whether manufacturer, architect or scientific adviser—he will usually not be held liable to a third party, according to systems of responsibility derived from either the civil or common law.[1] Any other solution would in fact be unworkable in the majority of cases, except at the expense of completely suppressing initiative. It will be remembered that the tort of negligence entered Anglo-American law as the delictual counterpart of the limited liability conceded to corporate business concerns. Even so, it was found impossible to adopt negligence as the sole or exclusive norm of responsibility in municipal jurisprudence. In circumstances where an undue risk of harm was created, whether from an explosives factory or from a water reservoir, strict liability came generally to be imposed either by the courts or by the legislature, even where the defendant could show that he or his contractor had taken all reasonable care. Forewarned of the stringency of the legal consequences, he may insure against possible liability and include the additional cost in his running expenses; in addition, so the argument runs, he has a greater incentive to prevent accidents.[2]

Whilst this broad division of industrial risks, into those governed by negligence and those determined on a basis of strict liability, was being

[1] The contractor, if a manufacturer or supplier of goods, may well be independently liable to the third party under the doctrine of *Donoghue* v. *Stevenson*, [1932] A.C. 562, however, or under the decision in the similar American case of *MacPherson* v. *Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (1916). Under the rule laid down in these two cases, a manufacturer or supplier of goods owes a duty of reasonable care to those whom he may, or ought reasonably, to anticipate will be injured by a failure to exercise that degree of care in the preparation of the product. No comparable doctrine of 'product liability' seems yet to have developed in the civil law countries; see, however, Mazeaud, 'La Responsabilité Civile du Vendeur-Fabricant', *Revue Trimestrielle de Droit Civil*, 53 (1955), p. 611.

[2] The reasoning advanced, for example, by Soviet jurists, to cover the case of non-profit-making activities; Gsovski, *Soviet Civil Law* (1948), vol. 1, pp. 509–10.

established in municipal systems, the principles of responsibility in international law followed a different and more checkered pattern. The century which saw the growth of industrialization in Europe and North America also witnessed the rise of the national State in its modern form. Following in the steps of Hegel, although this was a path to which many had contributed, the positivist school of jurists, represented here notably by Jellinek, Triepel and Anzilotti, having attacked natural law and the use of municipal analogies, sought to found international law solely on the will and autonomy of the State.[1] For them, therefore, a State incurred responsibility only within the limits of its consent; having once expressed its consent, however, by means either of a treaty or of a customary rule of international law, its liability was absolute. In reaction against the extremes of this position, their successors such as Schön and Schücking came to adopt a more moderate and 'legal' attitude, a trend which has been continued by later writers. The method adopted in effect has been to lower the mental requirement, in the absence of intention, to that of fault or *culpa*, and to endeavour correspondingly to replace the limits of State consent by those of an objective system of international law. In this way an international standard has been achieved, varyingly described as that of 'due diligence' or of reasonable care, to regulate the performance of one State's obligations to another, particularly as regards the treatment of aliens and liability for harm done to foreign nationals.

It is not intended here to provide a detailed analysis of the numerous occasions on which international tribunals have dealt with such claims, few if any of which have been founded on circumstances at all analogous to the operation of a national system of atomic reactors. However, certain cases must be looked to, as they give some indication of the range of discretion available to an international court called upon to decide a claim between two States arising out of a nuclear incident. It is also proposed more specifically to examine the position relating to atomic risks adopted by developed municipal systems, in an effort to discover whether or not it is possible to speak, at least in this extreme instance, of a 'general principle' of strict liability for ultra-hazardous activities which international law might apply. The steps taken or envisaged to regulate responsibility and the extent of redress for any damage so inflicted must then also be considered.

II. The General Principles of Law

'The general principles of law recognised by civilised nations', provided in Article 38 of the Statute as one of the four sources of law which the

[1] For details of the positivist position and further references see Brierly, *The Basis of Obligation in International Law* (1958), esp. pp. 13–17; the brilliant account in Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 134–43; and Ago, 'Positive Law and International Law', *American Journal of International Law*, 51 (1957), p. 691, esp. pp. 699–700.

International Court of Justice may apply, have caused debate amongst writers from the date of their inclusion in the Statute.[1] In practice the International Court has made sparing use of its powers under this head, since it has usually found sufficient support for its decisions either in treaties governing relations between the contending States or in established customary rules. On such occasions as it has resorted to Article 38 (1) (*c*), the Court has done so without making an express and detailed comparison of the relevant provisions of municipal law in its judgment. Having been satisfied, apparently upon the pleadings of the parties, that a certain rule did in fact exist of a sufficiently general and uniform nature, the Court has considered itself entitled to proceed without further proof or discussion. Rules which the Court has relied on in this way have usually related to procedural and evidentiary issues, often unmentioned in specific agreements between the parties, and not to issues of substance. It seems agreed, nevertheless, that in certain ill-defined spheres some 'principles' do exist which may fairly be regarded as of a substantive rather than adjectival nature, chief amongst them being the principle of responsibility for breach of an international obligation. Thus in the well-known *Chorzów Factory* case, the Permanent Court of International Justice stated in broad but express terms that:

'It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.'[2]

Unassailable in itself, this dictum leads inevitably to the further inquiry, on which no settled agreement has yet been reached, namely, what standard of care international law is prepared to adopt in a delictual situation.[3] On this point, Oppenheim seems to represent the general consensus of learned opinion when he writes:

'An act of a State injurious to another State is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence.'[4]

As has been suggested elsewhere,[5] this statement perhaps owes as much to opposition to the extreme positivist position, which would have effectively reduced international law to a code of moral injunctions, as to the attitude dictated by international jurisprudence. In support of the view expressed in Oppenheim, the learned editor of the eighth edition cites certain dicta

[1] Cf. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 1–2, and works cited therein.

[2] *P.C.I.J. Reports* (1928), A. 17, p. 29.

[3] This is not to suggest that international law is obliged to adopt one standard exclusively. See, for example, Sandström, *Yearbook of the International Law Commission*, 1956, at p. 242, on the possibility of different criteria being adopted as in most municipal systems.

[4] Oppenheim, *International Law*, vol. 1 (8th edn.), p. 343.

[5] By the present author, 'International Protection Against Nuclear Risks'; to be published in the *International and Comparative Law Quarterly* (1961), vol. 10, Part 4.

from the *Corfu Channel* case[1] between Albania and the United Kingdom in 1949 in which the International Court refused to hold that any responsibility attached to Albania, the defendant state, by reason merely of the fact that the accident complained of took place within her territorial waters. In that case, however, the issue of the imputability of the acts or omissions to the defendant State, intrinsic to any determination of State responsibility, was present in a more crucial form than is normally encountered, since it could not be proved that Albania had *herself* laid (and in that manner was responsible for) the mines in the Channel. The International Court held, nevertheless, that the exclusive control exercised by the territorial sovereign over the circumstances surrounding the act entitled the plaintiff State to rely on circumstantial evidence. 'This indirect evidence', said the Court, 'is admitted in all systems of law, and its use is recognized by international decisions.'[2] Having determined by these means that the minelaying could not have taken place without at least the knowledge of Albania, and that, though it had been possible for her to take 'necessary steps' to warn shipping, she had neglected to do so, the Court concluded that 'these grave omissions involve the international responsibility of Albania'[3] and that she was in consequence under a duty to pay compensation for the damage which ensued.

Neither in this case, nor in the *Trail Smelter* arbitral award,[4] in which Canada was held liable for the damage done to crops over the American border by an installation situated in British Columbia, were any conditions of responsibility laid down other than those of (*a*) knowledge on the part of the defendant State of the potential cause of harm, and (*b*) the possibility that remedial or preventive action could have been taken. There does not seem, therefore, to be any reason why an international tribunal, faced with a claim by State A against State B arising out of damage done by a nuclear reactor, need adopt any other tests of liability. Certainly the rule of evidence adopted by the International Court in the *Corfu Channel* case, under which the defendant State is called upon to inquire into and to explain happenings upon its territory which cause damage to other States, on pain of having adverse inferences drawn from its failure to do so, could properly and usefully be invoked. The possibility, if no more, remains, however, that the defence of reasonable care might be raised by the defendant State. It can by no means be assumed that in the *Corfu Channel* case, Albania would have been held liable if she had shown that reasonable measures had been taken, even if they had proved ineffective in the circumstances; nor was this defence directly before the tribunal in the earlier *Trail Smelter* award. In this way, the injured State, owing to its inability to establish either

[1] *I.C.J. Reports*, 1949, p. 4.
[2] Ibid., p. 18.
[3] Ibid., p. 23.
[4] Award II, *R.I.A.A.* (1941), vol. 3, p. 1905.

intention or negligence on the part of the defendant State, would find its claim defeated unless—assuming that there was no treaty provision—some further ground could be adduced as to why strict liability should be imposed. It therefore becomes necessary to turn to municipal jurisprudence to discover what attitude or principle would be generally adopted in the case of such ultra-hazardous risks.

In Anglo-American jurisprudence three heads of liability in tort offer techniques for dealing with this problem.[1] One possibility is that atomic reactors should be classified as nuisances for which strict liability might be imposed. The concept of nuisance, with its accent on the reasonableness of competing interests in land and the accompanying admission of activities interfering with the enjoyment of others, renders it doubtful, however, whether this form of action would provide adequate protection to the public against the isolated dangers of a runaway reactor,[2] without also bringing into play the principle of strict liability in *Rylands* v. *Fletcher*.[3] Another possibility is liability for unintended harm in the form of the tort of negligence, and this alternative was in fact considered in one of the few cases of injury through radiation, other than those arising from the use of hospital X-rays,[4] which appears in the law reports before 1945. In *La Porte* v. *United States Radium Corporation*[5] the plaintiff brought an action when she discovered that she was suffering from radium necrosis twelve years after she had left her employment as a radium dial painter. It was argued on her behalf that the defendants, her former employers, should

[1] Articles on this aspect include Freedman, 'Nuisance, Ultrahazardous Activities and the Atomic Reactor', *Temple Law Quarterly*, 30 (1957) (2), p. 77; Lloyd, 'Liability for Radiation Injuries', *Current Legal Problems*, 12 (1959), p. 33; Seavey, 'Torts and Atoms', *California Law Review*, 46 (1958), p. 3; and Stason, 'Tort Liability for Radiation Injuries', *Vanderbilt Law Review*, 12 (1958), p. 95.

[2] Nuisance would seem most applicable when dealing with problems arising out of the disposal of radioactive waste, particularly by discharge into rivers. This matter is about to be regulated in the United Kingdom by the Radioactive Substances Bill, introduced in the House of Lords on 24 November 1959, making permanent certain provisions of the Atomic Energy Act of 1954 and setting out a formula for national control and disposal of all radioactive waste.

[3] (1866), L.R. 1 Ex. 265; affirmed (1868), L.R. 3 H.L. 330. The decision of the House of Lords differed in certain respects from that which it affirmed given by the Court of Exchequer Chamber below. In particular the House of Lords introduced the requirement of a 'non-natural' use of the land to establish liability. Although it is therefore difficult to state the rule with precision, an accepted and representative interpretation is that expressed by Salmond as follows: 'The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequence of its escape, even if he has been guilty of no negligence.' *Salmond on Torts*, 12th edn., p. 553. See also Prosser, *Selected Topics in the Law of Torts* (1953), p. 170.

[4] The International Commission on Radiological Protection issues recommendations governing the use, *inter alia*, of hospital X-rays, see discussion in vol. 13, pp. 6–21 and pp. 129–259, *Proceedings of the International Conference in Geneva* (August 1955), and generally, *National Laws and Regulations on Radioactive Protection* (published by the World Health Organization, 1955).

[5] 13 F. Supp. 263 (D.N.J. 1935). Discussed by Stason, loc. cit., pp. 95–97. Cf., however, the case of *Thoonen* v. *Commonwealth of Australia* in which the plaintiff recovered for severe injuries caused by a radioactive capsule which he found and pocketed whilst at work; Muldoon, loc. cit., vol. 44, No. 1, pp. 63 et seq.

not be allowed in equity to rely on the Statute of Limitations in order to rebut her claim. The Court dismissed this plea, however, and treated the case as one relating solely to negligence. It held that the duty of care was therefore to be measured in terms of medical and scientific knowledge as it existed at the time of her initial, even if unknown, injury. Although the standard of care in negligence is in theory proportionate to the circumstances, and may thus be made correspondingly high in the case of installation risks, it is probable that negligence would still prove an unsatisfactory remedy for members of the public and that claims based on negligence would properly be rejected by municipal courts.[1] Even with the aid of the maxim *res ipsa loquitur*, too heavy a burden would lie on the majority of plaintiffs in the case of injuries only doubtfully caused by radiation, or possibly the fault, not of the operator of a reactor, but of his independent contractor.[2]

On existing principles of Anglo-American law the most likely solution seems to be that the courts would impose strict liability on a nuclear operator in accordance with the doctrine of *Rylands* v. *Fletcher*. One may assume that the courts would experience little difficulty in classifying nuclear fuels and installations brought on to the defendant's land as things likely to do mischief if they escape. If, however, power reactors became very much more common and were manufactured in more varied sizes than at present,[3] the question might ultimately arise whether they had come to be a 'natural' use of land and therefore outside the doctrine of *Rylands* v. *Fletcher*. The doctrine of *Rylands* v. *Fletcher* is also attended by a number of more immediate disadvantages as a general remedy in municipal law; the requirement that there must have been an 'escape' of the dangerous thing from the defendant's land on to other land means that those employed on the site of the reactor, or any lawful visitor who might happen to be on the premises when an accident occurred, would be without a remedy.[4] Recovery for personal injuries may also be dependent on the

[1] The risks with which this article is chiefly concerned are those arising from materials which are either in a state of 'criticality' (i.e. when an atomic chain reaction is possible) or are capable of becoming so if improperly handled. One may anticipate that, whatever the position in other cases, for example as regards the use of radioisotopes, the standard of care in such instances will always be more stringent than that imposed by negligence alone. This division is approximately that adopted in national legislation; e.g. Articles 1, 7, 13 (2), 25 and 26 of the German Atomic Energy Act, *Bundesgesetzblatt*, 23 December 1959; Article 1 (*b*), United Kingdom Nuclear Installations (Licensing and Insurance) Act, 1959; section 11 (*t*) and (*aa*), United States Atomic Energy Act of 1954 as amended, 42, U.S.C.A. s. 20144 (*t*) and (*aa*).

[2] In *Walsh* v. *Holst & Co., Ltd.*, [1958] 3 All E.R. 33, the *res ipsa loquitur* maxim was applied against the defendant without proof by the plaintiff that the harm had *not* been caused by an act of the independent contractor for which the defendant was not answerable. It is difficult to say, however, whether this example will be widely adopted.

[3] The development of a practical 220-lb. reactor, no larger than a 5-gallon milk can, is reported from the United States. *Time Magazine*, 30 November 1959, at p. 59.

[4] *Read* v. *Lyons (J.) & Co., Ltd.*, [1945] K.B. 216; [1947] A.C. 156.

plaintiff's occupation of land,[1] whilst uncertainty surrounds the exact scope of the defences, such as that the damage resulted from the act of a stranger or from an Act of God, which are open to a defendant under this doctrine. Nevertheless, it is submitted, in accordance with the forthright opinion of Prosser,[2] that in the absence of legislation the majority of common law jurisdictions would rely on the doctrine of *Rylands* v. *Fletcher* to establish the strict liability of a reactor operator in the event of a nuclear accident causing widespread damage.

Within the United Kingdom the matter is now regulated specifically by the 1959 Nuclear Installations (Licensing and Insurance) Act,[3] which continues the provision laid down by the 1954 Atomic Authority Act[4] imposing strict liability on all reactor operators. Section 4 (1) of the 1959 Act reads:

> 'Where a nuclear site licence has been granted in respect of any site, it shall be the duty of the licensee to secure that no ionising radiations . . . cause any hurt to any person or any damage to any property whether that person or property is on the site or elsewhere.'

The exact scope of such liability, even with the express exclusion of the consequences of armed conflict,[5] remains uncertain. It seems clear that a trespasser on a nuclear site could recover, although there may be doubt about a servant of the Atomic Energy Authority who by a deliberate act caused an escape of nuclear radiation. On the other hand, the possibility of a remedial action against such a person or against a manufacturer of nuclear equipment or installations appears in any event to have been removed by a further subsection,[6] which provides that all responsibility shall be borne solely by the reactor operator. Does that mean, however, that a defence of contributory negligence may never mitigate damages in an action brought by a workman or trained scientist? On these issues the 1959 Act, like its predecessor, remains silent.[7]

[1] In *Perry* v. *Kendricks Transport Ltd.*, [1956] 1 All E.R. 154, however, Parker L.J. (as he then was) was of the opinion that it was not open to the Court of Appeal to withhold redress on the grounds of this distinction. See also Stallybrass, 'Dangerous Things and the Non-natural User of Land', *Cambridge Law Journal*, 3 (1929), p. 376, esp. at p. 387, for an interpretation of the *Rylands* v. *Fletcher* doctrine as one relating to ultra-hazardous activities.

[2] 'The first case involving damage from the escape of radiation from the use of atomic energy has yet to reach the courts. When it does, it is not difficult to predict that there is no court which will refuse to apply to it the principle of strict liability found in the cases which follow *Rylands* v. *Fletcher*'; Prosser, *Handbook of the Law of Torts* (1959), at p. 336.

[3] 7 & 8 Eliz. II, ch. 46. The Act has not yet come into force; section 14 (2).

[4] 2 & 3 Eliz. II, ch. 32.

[5] Section 4 (1).

[6] Section 4 (2). This is subject to an exception in the case of carriage outside the United Kingdom in non-British registered ships or aircraft; section 4 (3). It may be noted that the International Atomic Energy Agency has prepared draft regulations relating to transport: see I.A.E.A., Doc. Nos. TO/HS/15 and TO/HS/17 Revised.

[7] The Attorney-General stated in the House of Commons that the defence of contributory negligence still applied, *Hansard*, 29 April 1954, col. 1854. The German Atomic Energy Act

An additional basis of strict liability which exists under the American *Restatement of Torts*[1] may also be noted. Section 519, headed 'Miscarriages of Ultrahazardous Activities Carefully Carried on', states that, subject to certain exceptions:

'. . . one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the author should recognise as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto, from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.'

The definition of an ultra-hazardous activity given in the next section is as follows:

'An activity is ultrahazardous if it (*a*) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (*b*) is not a matter of common usage.'

This formulation has not yet found widespread favour in the United States, although it has been adopted by certain states, such as California, which had previously been reluctant to follow the doctrine of *Rylands* v. *Fletcher*.[2] Although drafted in the far off pre-atomic days of 1938, the Restatement contains perhaps the most satisfactory solution which Anglo-American jurisprudence has so far evolved, in the absence of specific legislation, to deal with liability for ultra-hazardous activities. Providing as it does, practical but not inflexible principles of strict liability, both national legislatures and international bodies might well take note of its skilled and judicious approach.

If an action following a nuclear incident were brought in France today it seems agreed that liability would be determined by the terms of the presumption laid down in Article 1384, paragraph 1, of the Civil Code.[3] In accordance with the well-known *jurisprudence* surrounding this Article, beginning with a celebrated judgment of 16 June 1896, given by the *Cour de Cassation*, the plaintiff has to show no more than that he has suffered harm from an inanimate object in the defendant's keeping. In order to

makes a specific provision of exemption from liability and recourse, where the plaintiff 'has caused the damage either wilfully, or by knowingly infringing statutory or other safety or protective provisions, or owing to careless ignorance of such provisions' (s. 40 (1)); in other cases s. 254 of the *Bürgerliches Gesetzbuch* shall apply (s. 27).

[1] *Restatement of the Law of Torts*, vol. 3, sections 519–520 (1938).

[2] See Stason, loc. cit., pp. 102–4.

[3] Civil Code, Article 1384, para. 1: 'whoever has the custody of a chattel is liable for any damage caused by that chattel.' See H. and L. Mazeaud and Tunc, *Responsabilité Civile* (5th edn., 1958), vol. 2, p. 342; Lawson, *Negligence in the Civil Law* (1955), esp. pp. 43–50; von Mehren, *The Civil Law System* (1955), p. 367. For the application of civil law to nuclear risks see Rodière, 'Responsabilité civile et risque atomique', *Revue International de Droit Comparé*, 11 (1959), p. 505; von Caemmerer, 'Responsabilité du fait des choses inanimées et le risque atomique', 9 (1957), p. 673. Article 1384, para. 1 has already been applied in an action concerning harm caused by radium needles. *Trib. Civ. Marseille*, 8 June 1950; *Gaz. Pal.* (1950), vol. 2, p. 137. See Rodière, loc. cit., at p. 507.

rebut the presumption thus placed upon him, the 'guardian of the thing' must then define the circumstances so as to prove that the accident was caused either by the intervention of *force majeure*, or by the act of the plaintiff himself, or by the unforeseeable and irresistible act of a third party. If he fails to do so, then the victim recovers in full. By this means France has succeeded hitherto in embracing the bulk of accidents due to industrial causes within a framework of responsibility laid down in 1804. The particular device adopted, that of a presumption of liability through proof of causation, is the more interesting in that France, a country engaged in a large civil atomic energy programme, has not also yet promulgated special legislation to determine the extent of redress. This fact lends support to the view that amongst the difficult problems with which courts will have to deal in connexion with atomic accidents, those relating to evidence and procedure may well prove the most incapable of a simple solution. Certain effects caused by exposure to radiation are similar to diseases and abnormal conditions ordinarily present in the population. No known clinical test can distinguish between leukaemia, for example, caused by radiation and that existing in a particular person stemming from an unknown but apparently natural cause.[1] A distinction may be drawn here between acute and delayed radiation effects.[2] In the former case, physical damage is manifested within a reasonably short period and a plaintiff could normally show that he had recently been subjected to a source of intense radiation. Delayed radiation effects, on the other hand, are usually caused by a short exposure to radiation or are the cumulative result of such exposure over a long period. In this case the effects may not become apparent until ten or twenty years have passed. As a further complication, the damage may not manifest itself in some cases until the succeeding generation—a fresh problem for unborn children and lawyers alike.[3] In the light of such factors it has already proved necessary in some countries to revise the existing limitation statutes,[4] and further measures may be required to protect children unborn at the date of initial injury, if indeed the latter concept can be applied at all. More generally, however, it is necessary that the *onus*

[1] See Hutton, 'Evidentiary Problems in Proving Radiation Injuries', *Georgetown Law Journal*, 46 (1957), p. 52; id. 'Res Ipsa Loquitur and Actionable Radiation Injury', *Tennessee Law Review*, 25 (1958), p. 327. Two coroners' inquests, widely reported in the press, were held in June 1958 to determine whether the death through leukaemia of two British ex-servicemen, present at the Christmas Island bomb tests in May and June 1957, had been caused by radiation. An open verdict was reached after much medical evidence.

[2] See Medical Research Council, *Statement on the Report of the United Nations Scientific Committee on the Effects of Atomic Radiation* (1958), Cmd. 508; Powell, 'Effects of Radiation on Man', *Vanderbilt Law Review*, 12 (1958), p. 81.

[3] Cf. *Walker* v. *G.N. Ry. of Ireland* (1890), 28 L.R. (Ir.) 69. It should perhaps be pointed out that cases of normal reproduction following fairly heavy exposure to radiation have also been reported; see Powell, loc. cit., at p. 86.

[4] E.g. Nuclear Installations (Licensing and Insurance) Act, 1959, section 4 (7).

probandi imposed on the plaintiff should be reduced so far as is compatible with justice, a need which Article 1384, paragraph 1, goes some way to meet.

The Soviet Civil Code which effectively represents the views expressed in the enactments of other Communist countries, contains a chapter entitled 'Obligations Arising From Injury Caused to Another' (sections 403–15), corresponding to the delictual liabilities of civil and common law jurisprudence.[1] In the belief that 'causation' alone should be sufficient to establish liability and that the requirement of 'fault' was often responsible for injustice, Soviet jurists tried for a period of approximately twenty years to dispense with the latter requirement. Yielding at last to statements issued by the R.S.F.S.R. and U.S.S.R. supreme courts, it is now settled that the principle of negligence or fault, as propounded in section 403[2] shall represent the general rule, whilst strict liability may be imposed in the case of ultra-hazardous activities. Section 404 provides as follows:

'Individuals and enterprises whose activities involve increased hazard for persons coming into contact with them, such as railways, tramways, industrial establishments, dealers in inflammable materials, keepers of wild animals, persons erecting buildings and other structures, and the like, shall be liable for the injury caused by the source of increased hazard, if they do not prove that the injury was the result of *force majeure* or occurred through the intent or gross negligence of the person injured.'

Soviet commentators, having rejected the Roman law maxim *cujus commodum ejus periculum* as capitalist in tone, have justified the section largely in terms of social policy, including the promotion of safety measures and the hardship imposed on a plaintiff if the enterprise could escape merely by showing that all reasonable care had been taken. In view of the applicability of these considerations in the case of nuclear incidents, we may assume that Soviet courts would determine any claim so arising under this section.

The German, Austrian and Swiss civil codes all contain provisions demanding proof of fault to establish liability, i.e. a general requirement of negligence, a principle also to be met with in other systems, including the French Civil Code.[3] In the German, Swiss and Austrian systems, however, unlike French law, and indeed unlike all other modern systems, a broad distinction has been drawn between strict liability and liability for negligence, solely through legislative intervention. Railways, cars, aeroplanes,

[1] See Gsovski, *Soviet Civil Law* (1948), vol. 1, pp. 485–555; Gsovski and Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe* (1959).

[2] 'Anyone causing injury to the person or property of another must repair the injury caused. He is relieved from liability, if he proves that he could not prevent the injury, or that he was privileged to cause the injury, or that the injury arose as a result of the intent or gross negligence of the person injured'.

[3] Germany, section 823, *Bürgerliches Gesetzbuch*; Austria, section 1053 of the Civil Code; Switzerland, Article 41, *Code des Obligations*, corresponding to Article 1382 of the French Civil Code.

high-tension electrical systems, gas-holders and reservoirs are now all subject to a special régime of strict liability for created risks—*Gefährdungshaftung*.[1] The fundamental notion behind such laws has been that since these socially desirable but nevertheless dangerous activities involve an unavoidable risk to the public, the exploiter should be made to pay for any damage inflicted, and, as a first step, to insure himself against possible liability. Since the operator will be held liable even though he has exercised reasonable care and supervision of the enterprise, it is assumed that he will constantly endeavour to reduce the extent and likelihood of an accident. As an added incentive the practice of specifying statutory maximum figures has been adopted. The cost of insurance premiums can therefore be calculated more exactly and cheaply and allowed for in current business or operating expenditure. A car driver, for example, may have to pay up to, but not more than, 25,000 German marks for each accident in which he causes material damage. The injured party will then have to show negligence on the driver's part in order to gain compensation over this amount or to recover any other form of loss. This double standard thus serves to keep the driver in check, whether he was 'at fault' or not. In the sphere of atomic liability both Switzerland and the Federal German Republic have now undertaken special legislative régimes entailing the strict liability of a reactor operator.[2]

As was said by Sir Arnold McNair (as he then was) in the Advisory Opinion of the International Court on the *International Status of South-West Africa*.

> 'The way in which international law borrows from this source (of Article 38 (1) (*c*)) is not by means of importing private law institutions "lock, stock and barrel", ready made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.'[3]

Although this dictum was directed at the application of private law analogies to the institution of an international mandate, the reasoning behind it is equally apposite to the adoption by international law of any other rule of municipal law. What are to be looked to are not the minutiae

[1] *Reichshaftpflichtgesetz*, 7 June 1871; *Sachschadenhaftpflichtgesetz*, 29 September 1940; these are both still in force in Austria also; Switzerland: Law governing electricity, 24 June 1902; Law governing railway liability, 28 March 1905; Law governing motor vehicles, 15 March 1932.

[2] 'The Peaceful Use of Atomic Energy and the Protection Against Its Dangers Bill (Atomic Energy Act)', *Bundesgesetzblatt*, 23 December 1959, Part IV, sections 25–40; Zipfel, 'Atomic Energy Legislation in Switzerland', *Progress in Nuclear Energy, Series X, Law and Administration* (1959), vol. 2, p. 616. See also O.E.E.C.–E.N.E.A., *Comparative Study of Atomic Legislation in Europe* (May 1959), esp. pp. 37–45 and 91–98.

[3] *I.C.J. Reports*, 1950, p. 128 at p. 148.

of private jurisprudence, which are then to be incorporated *in toto* in international law, but 'the rules and institutions' which alone provide an adequate indication of the 'policy and principles' of municipal law. Applying this test it is submitted that the principle of strict liability, i.e. liability independent of proof of either intention or negligence, has been adopted in one form or another by all modern legal systems in order to regulate responsibility for the creation of ultra-hazardous risks. Certain conditions must, however, be fulfilled before such liability may be imposed, namely, that a desired social good should be derived from the particular activity; and secondly, that that activity must involve an unusual risk of harm to the general public which cannot be eliminated by the exercise of reasonable care. Since the operation of a national system of nuclear reactors would amply fulfil these conditions, an international tribunal might thus properly hold itself entitled to apply the principle of strict liability, in order to determine the responsibility of one State to another for any damage so caused.

The following points also emerge more specifically from this comparative survey of municipal law. Firstly, having gone furthest in making negligence, with its accompanying moral satisfaction, the normal test of responsibility, the Anglo-American common law is probably the system least adapted to extend its present principles of strict liability to cover this new and dangerous source of power. French law, on the other hand, which reduces the evidentiary burden to a minimum according to pre-industrial concepts, is probably the best suited, although here too the solution is hardly satisfactory. The American, English, Soviet and French legal systems, however, do at least possess general principles of liability for created risks. In Germany and Switzerland special legislation on the accepted pattern has already proved essential, if national tribunals were to avoid recourse to extraordinary clauses granting them reserve powers. Existing German legislation on ultra-hazardous activities does, however, provide two useful examples: firstly, of a practical combination of strict liability with liability for negligence; and secondly, of a clear recognition of the fact that strict liability can in practice only be applied when insurance is obtainable and, *ex hypothesi*, when the risks can be accurately assessed. These latter requirements relate, of course, to the economic and physical conditions which must be present before strict liability can be imposed, and not directly to the reasons of social policy why a particular degree of responsibility should be exacted. But it may be noted that in all cases where the plaintiff has been given a remedy without proof of negligence, two systems have hitherto been available: either the entrepreneur has been held strictly liable, the solution most commonly adopted when the general public as such have been exposed to danger, or the victim has been compensated by a form of social security, the procedure followed in all the

countries mentioned in the case of industrial injuries. But insurance against the risk created—whether state or private—has been required under either solution. It is this aspect, previously often minimized or disguised when explaining the principles of tortious responsibility, which the advent of nuclear liability has now uncompromisingly revealed. For this reason alone many national legislatures have been provoked into activity and international measures proposed.

III. Proposed Solutions

The initial State monopoly of atomic experimentation, together with the great dangers involved, have aided the continuation of extensive governmental control schemes as the nuclear industry has expanded to include both the lucrative prospects of international trade and a growing number of business concerns. Two salient features of national legislation in this sphere have been the maintenance of an official near monopoly in atomic fuels, and the requirement that, in addition to financial guaranties, a potential nuclear operator must obtain a licence from the relevant national authorities. As a condition precedent to such a grant, a number of highly technical requirements have to be satisfied relating to the construction, scale and design of the installation, and these have effectively provided the first line of public protection. In the United States, under the MacMahon Act of 1946,[1] the Atomic Energy Commission originated as an exclusive federal Government utility. The United States Atomic Energy Act of 1954,[2] on the other hand, has as its declared object to 'strengthen free competition in private enterprise'. The Act is in no sense, however, a surrender to the unbridled forces of the market. Not only does the official authority, the Atomic Energy Commission, remain the exclusive owner and virtually the sole buyer or seller of nuclear materials, but questions of safety and not of economic viability have been rendered paramount in considering licence applications.[3] Many of the factors which have influenced American policy, such as the acute Federal–State rivalry and the supervision of the Congressional Joint Committee, are not, of course, likely to be encountered elsewhere. Nevertheless, Britain, Germany, Sweden and Switzerland[4] have all now joined the United States in providing

[1] 60 Stat. 755. [2] 68 Stat. 919.

[3] After the passing of the 1954 Act, the Director of the Division of Licensing and Evaluation, U.S.A.E.C., publicly announced that hazards evaluation would play a major part in the Commission's decision whether or not to grant a licence; owing to dissatisfaction which arose, however, the Act was subsequently amended to give increased powers to the Advisory Committee on Reactor Safety. See Green, 'The Law of Reactor Safety', *Vanderbilt Law Review*, 12 (1958), p. 115, at pp. 123 and 131–4.

[4] Swedish Draft Law on Compensation for Damage Caused by the Operation of Nuclear Reactors (Nuclear Liability Act), 1 October 1959; for legislative measures see generally O.E.E.C.–E.N.E.A., *Comparative Study of Atomic Legislation in Europe* (May 1959).

specifically for the control of private industry by means of licences and other forms of governmental supervision.

Provision has also been made under these schemes to restrict the full extent of possible liability which individual operators and manufacturers might incur under the existing patterns of municipal law. Within a national framework at least, the problems of determining the defendant and the scale of compensation in order, *inter alia*, to protect a nascent industry, are comparatively easy to determine. However, the present reliance of less-advanced countries on the superior skills of others, particularly the Soviet Union, the United States and the United Kingdom, has increased the number of problems which may arise. If one of these countries injures citizens and property in another country through an atomic installation which it has supplied, to what extent may the donor state be held responsible? If private consortia, possibly from several countries, erect and operate a reactor, in what proportions should liability be allocated if a technical but otherwise unknown fault develops? As befits instances raising issues, in Jessup's phrase, of 'transnational law',[1] the solution in the absence of express agreement, or in the event of a dispute as to interpretation, would seem once more to lie within a study of the comparative aspects of private jurisprudence, including the conflict of laws. Here, as in so many other spheres, international law appears to be entering territory traditionally regarded as of interest solely to municipal lawyers. Does manufacturers' liability under the rule in *Donoghue* v. *Stevenson*[2] represent a general principle of law?

The complexity and novelty of the issues involved are further illustrated by the recent announcement that the International Atomic Energy Agency, in addition to running its own laboratory, is to supply Japan and Finland with technical assistance and quantities of special fissionable materials.[3] The possibility thus exists that the Agency may be held responsible for any accidents which may be caused, including those arising out of the application of the Agency's own safeguards scheme. The European Nuclear Energy Agency is also engaged in several joint projects, including one in conjunction with the United Kingdom Atomic Energy Authority at Winfrith Heath in Dorset.[4] It was reported at the Second Geneva Conference on the Peaceful Uses of Atomic Energy that a hundred megawatt nuclear reactor situated on the south-east coast of England could, in the worst circumstances, do damage as far afield as Lille, Charleroi or Karlsruhe—thus possibly involving a number of sovereign States and perhaps

[1] Jessup, *Transnational Law* (1956). [2] [1932] A.C. 562. See p. 226, n. 1 above.

[3] International Atomic Energy Agency: *Annual Report to the General Assembly*, 1958–9; United Nations, London Information Release, Nos. 3 and 4, 1960.

[4] The text of the agreement is contained in *Legal Series No. 1. Multilateral Agreements* (1959), published by the International Atomic Energy Agency, p. 249; under Articles 1 (*b*) and 5 (*d*) the United Kingdom Atomic Energy Authority has assumed sole liability, including an obligation to reimburse the other parties in case an action should be brought against them.

international bodies, as either plaintiffs or defendants.[1] Although international organizations, like States, may doubtless stipulate to avoid liability in most cases, the extent of possible harm may defeat such efforts as are contained in merely bilateral contracts. Moreover, as regional agencies grow in scope and vigour, the pressure upon them to assume the burdens, as well as the benefits, of their enterprise may be expected to increase. The general conditions which have so far been evolved to govern liability if a nuclear accident should occur, whether with purely national consequences, or with international repercussions stemming from the nationality of the victims or suppliers, may be effectively considered under two heads, respectively concerning the extent of liability and the choice of defendant.

(*a*) *The extent of liability*

Whilst public protection is essential in order to prevent accidents and also to provide adequate compensation in case they should occur, it is equally evident that the nuclear industry alone will be unable to meet the whole of the cost of possible harm, and to that extent may be unable to participate in the rapid expansion demanded. Insurance, the means which industry has previously employed to withstand the imposition of strict liability, is plainly inadequate in the amounts and on the scale conventional markets can provide. In response to this challenge, special insurance pools have been set up; the United States insurance syndicates have been able to muster $60 million insurance cover per installation, four times the amount ever previously attained, but it appears that sums outside the United States are nowhere above $15 million, with the possible exception of the United Kingdom.[2] Reverting therefore to the basic principle that the operation of nuclear reactors can rarely, if ever, be solely for private profit, but will form part of a system of public utilities, it has been decided to make the community which will enjoy the benefit, also share the cost of paying for the consequences if anything goes wrong. It only remains necessary to determine the size of the community and to apportion liability amongst the possible defendants, problems which, as has been seen, are as much international as national.

In order to overcome the reluctance of American manufacturers to enter the field, existing legislation in the United States was supplemented in 1957 by the passing of the Price Anderson Act.[3] This requires that all

[1] Royal Netherlands Academy of Sciences, 'International Aspects of Radioactive Contamination in Western Europe and the Necessity for International Control Arising from it', *Proceedings of the Second International Conference* (Geneva, September 1958), vol. 1, p. 366, at p. 371.

[2] Thomas, 'Can we Insure against Liability from Nuclear Incidents?', *California Law Review*, 46 (1958), p. 14; Besson, 'The Nuclear Energy and the Insurance Law', *Proceedings of the Vth International Congress of Comparative Law* (Brussels, 1958).

[3] 71 Stat. 576. For commentaries see *Michigan Law Review*, 56 (1958), p. 752 and *Harvard Law Review*, 71 (1958), p. 750.

reactor licensees shall provide insurance or other financial guarantee against third-party liability, up to an amount to be determined by the Atomic Energy Commission on a basis of prevailing conditions in the insurance market. If an accident should occur, however, causing damage beyond this figure, the Federal Government undertakes to indemnify and 'hold harmless' the licensee and 'any other person who may be liable for public liability',[1] up to a fixed ceiling of $500 million per nuclear 'incident'. If the damage suffered exceeds $500 million and the amount of insurance cover privately available, the loss is to lie where it falls.[2] Several points may be noted about this American approach. Firstly, questions of substantive liability have not been touched but left to the determination of State courts. For this reason alone the applicability of common law principles remains important. Secondly, since State courts might take different views as to liability and its extent, either under their own internal rules or those of the conflict of laws, the possibility of 'forum shopping' exists, a problem which also arises, perhaps more critically, at an international level.[3] Lastly, this legislative measure only applies in the event of accidents occurring within the United States; it provides no protection for an American supplier sued abroad, nor could it be used as a defensive remedy if a foreign plaintiff brought an action against his American contractor in United States courts for an accident which occurred elsewhere.[4]

Although this 'public indemnity' approach has been repeated in the legislation of other countries, most notably in that of the Federal German Republic, it has not yet been adopted in any international agreement. However, the Treaty entered into by the United States and the Euratom Community in 1957 contains the following clause:

'The Government of the United States and the Community recognize that adequate

[1] Section 170 (*c*). As a further novel concept it is provided that the Government indemnity will include damage to the property of the body legally liable, with the exception of the property actually situated at the site. Claims for workman's compensation are left to the usual channels.

[2] Section 170 (*e*).

[3] Seavey has therefore proposed that a federal statute should be passed, 'Torts and Atoms', *California Law Review*, 46 (1958), p. 3.

[4] Section 170 (*o*) provides that the nuclear incident must occur 'within the United States'. When attention was called to the lack of protection for the American exporter, the Congressional Joint Committee stated that this was a matter for diplomatic negotiation and international agreement. The Committee also refused to make any proposal for dealing with the problem which would arise if an accident in the United States caused damage in Canada and Mexico. Canada did in fact send observers to the first contested hearings for the grant of a licence to construct a reactor in the United States, without, however, making any formal intervention.

Under the 1959 United Kingdom legislation, liability only extends beyond territorial limits when radioactive substances are being carried on British registered ships or aircraft (section 4 (3)); when pressed during the Committee stage to extend liability, the Government replied that it lacked jurisdiction to make regulations governing responsibility for damage caused on board foreign vessels, even where these might be carrying nuclear materials for a British firm. If a nuclear-powered ship which the British Government considered unsafe were to approach British shores and to threaten from, perhaps, 50 or 60 miles away, the United Kingdom Government might therefore come to regret this official pronouncement. It may be noted that Denmark refused to allow the United States submarine Skate to enter Copenhagen harbour in 1958. *New York Times*, 22 and 23 August 1958.

measures to protect equipment manufacturers and other suppliers as well as participating utilities against now uninsurable risks are necessary to the implementation of the going programme. The Euratom Commission will seek to develop and to secure the adoption, by the earliest practicable date, of suitable measures which will provide adequate financial protection against third party liability. Such measures could involve suitable indemnification guarantees, national legislation, international convention, or a combination of such measures.'[1]

Under its constituent treaty the Council of Euratom has the power to issue directives to member nations to 'take all necessary measures to facilitate the conclusion of insurance contracts covering atomic risks'.[2] It is doubtful if this provision is adequate to enable the Council or the Commission *ex proprio vigore* to establish a system of indemnification or state guarantee on a 'Community' basis, without prior recourse to supplementary legislation on the part of the six member countries. Nevertheless, it is likely that Euratom will press for an ambitious scheme of this nature, after member States have ratified the less radical Convention prepared by the Organization for European Economic Co-operation.[3]

The British legislation which corresponds to the United States Price Anderson Act represents a less drastic approach, more in keeping with the Convention of the Organization for European Economic Co-operation. The Nuclear Installations (Licensing and Insurance) Act of 1959 enacts that private reactor operators must provide insurance cover, or other guarantee, up to £5 million for each site; such cover must continue during specified cover periods which will normally be of ten years duration.[4] Beyond the figure of £5 million, unlike the position according to United States legislation, and the equivalent German measure which provides for a State indemnity of 500 million German marks (approximately £35 million),[5] no Government indemnity is provided as of right. Instead, if existing funds are exhausted, or if a claim is made beyond the specially extended ten-year limitation period, the licensee is not required to make any payment unless and until Parliament has made special provision to reimburse him.[6] To some extent, therefore, atomic installations have been assimilated to natural catastrophes, such as floods or

[1] See Cavers, 'International Cooperation in the Peaceful Uses of Atomic Energy', *Vanderbilt Law Review*, 12 (1958), pp. 17 et seq. for details of the three principal documents concerned and of the difficulties encountered in securing full ratification by the United States. *The Agreement Between the United Kingdom and Euratom for Cooperation in the Peaceful Uses of Atomic Energy* (1959), Cmd. 702, also includes a provision for the adoption of 'suitable measures to provide adequate financial protection against third party liability' (Article XIV (2)).

[2] Article 98, Treaty Establishing the European Atomic Energy Community.

[3] The O.E.E.C. Convention on Third Party Liability in the Field of Nuclear Energy which was concluded on 29 July 1960 has been signed by the Governments of sixteen European countries including those of Federal Germany, France and Great Britain. The Convention will come into force upon ratification by five signatories.

[4] Section 5.

[5] Section 37, Atomic Energy Law, *Bundesgesetzblatt*, 23 December 1959.

[6] Section 4 (4).

earthquakes, dependent for relief on public charity. The initial £5 million is, of course, a sizeable sum, but the disparity between the various national figures is sufficient to cause doubts as to its adequacy. However, although subject to equally stringent liability, only reactors in the private sphere are bound to provide this limited amount of insurance cover; reactors run by the United Kingdom Atomic Energy Authority remain subject to unlimited liability.

One may wonder in what order the £5 million, or indeed any of the other sums, would be distributed in the event of a serious accident. Here presumably each legal system would look to established precedents and case law in an effort to discover what heads of recovery have been permitted when strict liability has been previously imposed.[1] The broad division between personal and proprietary damage also raises the question, with which no country has yet had to deal, of how to divide losses under these two heads if the total amount approached the maximum ceiling placed upon redress.[2] Following the Windscale accident the United Kingdom Atomic Energy Authority paid in full for the milk which it was found necessary to destroy, as well as in several cases where the complainant had suffered more indirect loss. Claims which were settled included one made by a farmer who was unable to sell his cattle when he sent them to markets where the attendants refused to handle them, and also a claim in respect of some unsold cabbages.[3] The obligation imposed on the Authority by section 5 (3) of the Atomic Energy Authority Act, 1954, is not to cause 'any hurt . . . or any damage', and this phrase is repeated to cover the case of private reactors in section 4 (1) of the 1959 Act. In the absence of any judicial decisions it is impossible to estimate either the force of such precedents as the Authority may establish, or to what extent the normal rules of legal causation and of remoteness of damage apply in such cases.[4]

The matter becomes correspondingly more difficult on an international plane. Assuming that it can be clearly shown that the reactors of a particular State have caused harm, then of course that State would be bound under established principles of international law not to discriminate against

[1] One problem concerning personal injuries, for example, is to decide whether any sum should be given for pain and suffering. Seavey, loc. cit., points out that this would be anomalous in a case where strict liability and not negligence was imposed. The German Atomic Energy Act, sections 28–31, makes detailed provision for the scale of recovery for personal injuries, in keeping with workmen's compensation legislation.

[2] In the *Thoonen* case, p. 230, n. 5 above, the plaintiff recovered £A23,585 (£18,868) for loss of a leg and other injuries; awards on this scale to 250 people would exhaust £5 million, leaving claims for damage to property unsatisfied.

[3] Highton, 'Atomic Energy in the United Kingdom', *Vanderbilt Law Review*, 12 (1958), p. 223 at p. 227.

[4] There appears little authoritative guidance in reported cases. Cf. *Read* v. *Croydon Corporation* [1938] 4 All E.R. 631, a test action following a typhoid epidemic believed to have been caused by contaminated watercress.

foreign nationals within its territory who suffered injury. In the absence of a regular treaty, what would be the position, however, as regards foreign nationals who suffered indirect loss within their own territory? The offending State would not itself be able to plead lack of financial means, if the *Russian Indemnity* case[1] and the *Serbian Loans* case[2] are any guide. Supposing, however, it were shown that sales of fish had declined in State A, following a reported rise in the radioactive content of catches due to the disposal of nuclear waste in the sea by State B.[3] Would State B be bound to pay for this, as well as for more direct loss? If several states had deposited radioactive waste in the ocean would it be necessary to show which particular State was responsible, or would it be possible to sue them jointly?

The Convention prepared by the Organization for European Economic Co-operation, on Third Party Liability in the Field of Nuclear Energy[4] provides that liability shall lie for damage to or loss of life or property 'upon proof that such damage or loss . . . was caused by a nuclear incident',[5] occurring within one of the contracting States. Moreover, the defendant operator or licensee may not rely on the classic defences to liability irrespective of fault, such as the unforeseeable intervention of a third party; the only defences open are that the incident was 'due to an act of armed conflict, invasion, civil war, insurrection, or a grave national disaster of an exceptional character'.[6] A further Article provides that within the framework of jurisdiction set up by the Convention the nature, form, extent and equitable distribution of compensation are to be governed by municipal legislation.[7] To that extent therefore established national precedents will continue to be extremely relevant. By contrast, it is expressly stated that the Convention is not intended, even as amongst the parties, to deprive a signatory of any remedy under international law which may be available in the event of a nuclear incident.[8] The maximum liability which a reactor operator, including a governmental authority, may incur under the Convention is limited to 15 million European Monetary Agreement units of account, corresponding approximately to the sum laid down in the recent United Kingdom legislation.[9] The operator is obliged to maintain

[1] *Hague Court Reports* (ed. by Scott, 1916), vol. 1, p. 532, at pp. 546–7, where the Permanent Court of Arbitration rejected this plea.

[2] *P.C.I.J. Reports*, 1929, A. 20/21, pp. 39–40 and 120, where, however, the issue was not directly before the Court.

[3] The issue of a waste-disposal licence by the United States Atomic Energy Commission was postponed after a protest by Mexico to the United States Department of State. Cited in Hydeman and Berman, op. cit., at p. 291.

[4] p. 242, n. 3 above.

[5] Article 3. Exceptions are provided in the case of damage to property in the keeping of the operator at the site, or to the means of transport if the accident occurs in transit.

[6] Article 9. These defences may, however, be derogated from by special legislation.

[7] Article 11.

[8] Annex II.

[9] This amount may, however, be reduced by national legislation to 5 million European Monetary Agreement units of account: Article 7 (*b*). The United Kingdom added a reservation to its signature, principally in order to limit the amount of compensation payable by private

insurance or other financial security up to this amount unless national legislation provides for a greater or lesser amount of coverage; in no case, however, may national legislation permit a financial guarantee of less than 5 million European Monetary Agreement units of account.[1] Thus in the event that the operator and/or his financial guarantor proved unable to meet the demands placed upon them by the Convention—if, for example, two serious nuclear incidents occurred within a short space of time and the financial security had fallen below the prescribed amount—official intervention might become necessary in order to avoid international responsibility falling upon the State itself.

(*b*) *The choice of defendant*

In circumstances where the reactors operated by one State cause harm across the frontier in another, it seems apparent that under existing principles of international law, including the general principles of law, a successful international claim could be maintained by the injured State. As was said by the Tribunal in the *Trail Smelter* case:

'. . . under the principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'[2]

If the question of an international claim rested there, it is doubtful if this in itself would be likely to produce an international convention. Governments would be unwilling to deal with the matter until they had to, and international lawyers would rest moderately content that at least there was some law, reasonably well defined, to cover the situation. However the complexity of the subject-matter has resulted in a doubling of the number of possible defendants, both national and alien, amongst the private firms and State corporations which together make up the international nuclear industry. Ideally, of course, a world-wide convention is required to ensure equal security and treatment for those injured, and also that conditions exist in which atomic energy development may proceed as rapidly as possible. The International Atomic Energy Agency has indeed already established a panel of experts which is in the process of drafting a Convention on minimum international standards regarding civil liability for nuclear hazards, designed to secure just these ends.[3] Although the Governing

operators in the United Kingdom to 14 million units of account, unless parliamentary approval is obtained to provide further funds.

[1] Article 10.

[2] Award II, *R.I.A.A.* (1941), vol. 3, p. 1905, at p. 1965. This statement does not in its terms include activities which take place outside national territory, such as the disposal of radioactive wastes in the high seas, but which eventually causes harm to the nationals or property of another State, including its traditional fisheries.

[3] Cole, 'The Work of the International Atomic Energy Agency', *Nuclear Power* (January 1960), p. 78 at p. 79. *Report of the Agency to the General Assembly*, 1958–9, paras. 208–9. The

Body of the Agency has provisionally approved the present proposals, which reflect the pattern of those put forward by the Organization for European Economic Co-operation, it is doubtful if at this stage a truly universal compact can be signed and ratified without leaving a wide range of discretion to member States. Although agreement may be reached on the principles of the absolute liability of the reactor operator, and of non-discrimination against aliens in the application of internationally valid remedies, it is difficult to imagine an acceptable formula being found to cover the more controversial issues of the maximum ceiling to be placed upon liability and of the extent to which recourse actions against suppliers or manufacturers should be admitted.

It is more likely that, during the coming decade, matters will continue to be regulated largely by *ad hoc* bipartite and regional arrangements. Both the United States and to a lesser extent the United Kingdom have adopted the practice of inserting 'hold harmless' clauses (borrowed from American practice in federal utility contracts) in international agreements, whereby all liability for nuclear goods transferred passes to the recipient state.[1] Although such an exemption provision doubtless covers the national atomic energy authority, it is by no means clear that private suppliers would be automatically protected, under an 'umbrella' principle. The further possibility exists to plague the American exporter, that if a foreign court awarded damages against him on the limited scale available according to local atomic legislation, that a further action for a very much larger sum might then be brought in the United States. Even if this were not so, in the event of an accident, or in times of political stress, the tendency might arise to blame the foreigner, or to accuse him of 'experimenting' with new equipment.[2]

Further inter-governmental measures have therefore been proposed amongst the States most directly concerned, in order to protect foreign suppliers and indeed manufacturers generally. In municipal legislation the principle has been widely adopted of 'channelling' responsibility solely towards the reactor operator, thus providing members of the public with an assured defendant without engaging in lengthy actions against more distant manufacturers. This device, which has usually been coupled with the requirement that the operator must provide an adequate financial

draft Convention has already been circulated to member States for comment; see *International and Comparative Law Quarterly*, 9 (1960), p. 494.

[1] E.g. Article VIII H of the Treaty between the United States and the Federal Republic of Germany concluded in 1951 provides that the United States shall be relieved of 'any and all liability . . . for any cause whatsoever arising out of the production or fabrication, the ownership, the lease, and the possession and use of such special nuclear materials or fuel elements after delivery by the (United States Atomic Energy) Commission'. Reproduced in Cavers, loc. cit., at p. 22.

[2] These fears are expressed in Atomic Industrial Forum, *International Problems of Financial Protection Against Nuclear Risk* (1959), a thorough study of the difficulties a foreign supplier may encounter.

guarantee against possible liability, has been supported by the need to make insurance available as easily as possible. Insurance experts appear to be of the opinion that the extreme risks of nuclear accidents, unexperienced in either extent or degree, are best comprehended at present by calculating the risk for the enterprise as a single entity, without further dividing it into the chance of 'manufacturers' and 'operators' liability.[1] Thus the United Kingdom Nuclear Installations (Licensing and Insurance) Act, 1959, states that, subject to the provisions as to carriage, 'no person other than the licensee shall be under any liability in respect of any hurt to any person or any damage to any property caused by any ionising radiations. . . .'[2]

Plainly it is in the interest of would-be exporter nations to seek to maintain this principle and to exclude, if possible, any recourse actions against foreign manufacturers. In so far as the foreigner will usually have relinquished control over the goods he has supplied, it would seem fair and just that responsibility should reside primarily with the conductor or 'guardian' of the installation. In addition the courts of the reactor State would normally be the ones best suited to determine the facts of the accident. Nevertheless, it appears difficult to justify a total exclusion of all possibility of recourse actions, even after the needs of public protection have been met. As conditions change—and to some extent they have already changed—from those of a sellers to those of a buyers market, the exporter countries may be forced to relax their attitude, at least where negligence on the part of the manufacturer is alleged.

In the course of its drafting, the Convention of the Organization for European Economic Co-operation has gradually moved towards a less rigid position on this point. The principle established as the basis of the Convention is that the reactor operator shall alone incur liability.[3] However, it is further provided that not only may the operator have a right of recourse against the doer of an intentional act, and, in certain restricted circumstances, against a carrier of nuclear materials, but a right of recourse is also allowed where an express provision has been made to that effect by contract;[4] by this means an opportunity has been provided for the expression of changing market conditions. A special régime has also been erected to deal with the complicated problem of the transport of nuclear materials. As far as possible the principle of channellization is adhered to: if a reactor operator sends nuclear materials from his installation, he remains

[1] See Belser, 'Atomic Risks: Third Party Liability and Insurance', *The Industrial Challenge of Nuclear Energy II* (published by O.E.E.C., 1958), p. 265; id., *The Present Position of Reactor Owners in Europe in respect to Third Party Liability and Insurance* (a paper presented to the Atomic Industrial Forum on 30 October 1957), esp. pp. 7–9.

[2] Section 4 (2).

[3] Articles 3 and 6. However, by specific legislation a State may provide that the carrier shall be solely liable in place of the operator, provided that both parties consent and the carrier obtains the requisite financial security. Article 4 (*e*).

[4] Article 6 (*f*).

responsible both for a due compliance with the pertinent health and safety regulations and also for any damage caused by an incident occurring before the materials have been taken in charge by another operator;[1] if the goods are sent to a consignee outside one of the contracting States, the operator remains liable until the goods are unloaded from the means of transportation.[2] Where, on the other hand, the operator is the recipient and the goods have been sent with his consent, he is liable for any damage to persons or property which takes effect within a contracting State, at any moment after the materials have been loaded on the means of transport.[3] At the same time the Convention permits a right of recourse to be exercised against the operator by anyone held responsible under existing international transport agreement, or under the legislation of a non-contracting State, for damage in respect of which the operator is liable under the Convention.[4]

Consequent upon the principle of channellization, the Convention provides that the courts of the installation State shall have sole competence to determine actions arising from the incident.[5] In the case where the incident is caused by goods in transit, however, the competent jurisdiction is that of the place where the goods were at the time; if that place cannot be precisely determined the sole jurisdiction is once more that of the original installation State.[6] Whilst the courts of the competent State do not have jurisdiction under the Convention in recourse actions brought by the operator himself, or in actions for contribution between operators held jointly and severally liable, they are intended to deal with all actions brought by those who have suffered direct injury or who have a right of recourse against the supplier. Once a final judgment has been rendered against an operator in respect of an action brought by an injured party regardless of nationality, residence or domicil, that judgment may be enforced in any of the other contracting States without re-examination as to the merits of the decision.[7] It is also expressly provided that sums due as compensation, interest or costs shall be freely transferable within the contracting States.[8]

IV. Conclusion

Since only one international convention relating to nuclear liability has yet been entered into, and that on a regional scale no attempt has been

[1] Article 4 (*a*) (i). [2] Article 4 (*a*) (ii).

[3] Article 4 (*c*). A State may require a foreign operator-consignee to increase the amount of his financial security up to the nationally enacted maximum. Article 7 (*e*).

[4] Article 6 (*c*). [5] Article 13 (*a*).

[6] Article 13 (*b*) and (*c*). Special provision is made to preserve unity of jurisdiction if two courts appear equally entitled to exercise jurisdiction. In the rare cases where the court is not that of the installation State, however, the court does not determine liability according to the *lex fori* but on the basis of the law of the installation State. [7] Article 13 (*e*).

[8] Similar provision is made for insurance and re-insurance premiums. Article 12.

made above to analyse exhaustively such proposals as have been put forward. The aim has indeed been more fundamental, namely, to show why such an agreement, whether confined to static reactors or including atomic-powered transport, is either desirable or necessary. The time has long passed when an international body could be envisaged, to seize all the reins of atomic development in its hands.[1] If for that reason alone, the ideal solution of an international insurance fund to evaluate risks on the widest possible basis, is probably to be disregarded. So too, it is unlikely that international agreement will be secured to implement the more radical suggestions put forward by municipal commentators,[2] that the concept of 'responsibility' should be replaced by that of 'compensation' in regulating questions of atomic liability, on a par with the position adopted in the case of industrial accidents. The problem of proving that the damage complained of was in fact caused by the operation of a particular nuclear installation (and not by radiation or installations in general) seems likely, however, to remain one of the most intractable with which courts will have to deal.

Nevertheless, many States are now pursuing their own national programmes, assisted by the International Atomic Energy Agency and a further network of bilateral and multilateral treaties. It is, indeed, the wide exchange of goods and services, particularly between countries themselves possessing a high level of skill, which has been largely responsible for the suggestions proposed for international means of both regulating and determining redress. If only in their own interests, therefore, it is to be hoped that the States of the world, or those at least for whom atomic energy is likely to become vital within the next twenty years, can be persuaded to ratify the agreements suggested. Provision even on the limited basis envisaged by the conventions proposed by the Organization for European Economic Co-operation and by the International Atomic Energy Agency would prove of inestimable value if the more ambitious plans for an interstate 'reserve fund' were to fail. These examples of transnational legal co-ordination would help to advance the steady unification of notions of private law, as well as to protect the public no less than the industry of the future.

[1] See the post-war proposals for an International Control Agency, discussed in Jenks, *The Common Law of Mankind* (1958), pp. 306–15.

[2] E.g. by Rodière, loc. cit., esp. pp. 514–18.

THE QUESTION OF THE COMPOSITION OF THE TRUSTEESHIP COUNCIL*

By THEODOR MERON[1]

THE object of this paper is to consider the effect of the attainment of independence by trust territories upon the composition of the Trusteeship Council. This question concerns the interpretation and application of Article 86 of the Charter of the United Nations.

GOVERNING TEXTS

It is proposed first of all to set out the provisions governing the composition of the Trusteeship Council. The main provision of the Charter is Article 86, which reads as follows:

'1. The Trusteeship Council shall consist of the following Members of the United Nations:

(*a*) those Members administering trust territories;

(*b*) such of those Members mentioned by name in Article 23 as are not administering trust territories; and

(*c*) as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

'2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.'

This provision is supplemented by the following Rules of Procedure of the General Assembly[2] which in their current version[3] read as follows:

'Rule 140

Except as provided in rule 148, the term of office of members of Councils shall begin on 1 January following their election by the General Assembly, and shall end on 31 December following the election of their successors.

* © T. Meron, 1961.

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[2] A/3660/Corr.1.

[3] These rules appeared previously in A/520/Rev.4 and A/520/Rev.3. Regarding their previous versions, see Rules 138, 139, 146, 147 and 148 in A/520/Rev.2 and A/520/Rev.1; Rules 128, 129, 136, 137 and 138 in A/520; Rules 87, 88, 96, 97 and 98 of the *Provisional Rules of Procedure of the General Assembly* (*as amended during the first and second parts of the first session*), A/71/Rev.1; Rules 87, 88, 96, 97 and 98 of the *Provisional Rules of Procedure for the General Assembly, as amended during the First Part of the First Session*, A/71; See also Rules 98, 99, 107, 108 and 109 in the *Report of the Committee on Procedures and Organization*, A/388; Rules 87, 88, 96, 97 and 98 in the *Report of the Secretary-General on Measures to Economize the Time of the General Assembly*, A/316; Rules 78, 79, 87, 88 and 89 in the *Report of the Preparatory Commission of the United Nations*, PC/20, pp. 16–17; Rules 93, 94, 102, 103 and 104 in the *Report by the Executive Committee to the Preparatory Commission of the United Nations*, PC/EX/113/Rev.1, pp. 25–26.

Rule 141

Should a member cease to belong to a Council before its term of office expires, a by-election shall be held separately at the next session of the General Assembly to elect a member for the unexpired term.

Rule 148

When a Trusteeship Agreement has been approved and a Member of the United Nations has become an Administering Authority of a Trust Territory in accordance with Article 83 or 85 of the Charter, the General Assembly shall proceed to such election or elections to the Trusteeship Council as may be necessary, in accordance with Article 86. A Member or Members elected at any such election at a regular session shall take office immediately upon their election and shall complete their terms in accordance with the provisions of rule 140, as if they had begun their terms of office on 1 January following their election.

Rule 149

A non-administering member of the Trusteeship Council shall be elected for a term of three years and shall be eligible for immediate re-election.[1]

Rule 150

At each session the General Assembly shall, in accordance with Article 86 of the Charter, elect members to fill any vacancies.'

It is clear that the number of States composing the Trusteeship Council is not determined in the Charter but is variable depending upon the number of members administering trust territories.[2]

Thus, the position of the Trusteeship Council is basically different from that of the other principal organs of the United Nations whose members are elected, in whole or in part, by the General Assembly. As regards the Economic and Social Council,[3] the Security Council[4] and the International Court of Justice,[5] both the total number of members constituting these organs and the number of members to be elected by the General Assembly in certain circumstances have been definitively laid down. As regards the Trusteeship Council, the total number of its members should be twice that of the members administering trust territories. The membership of the Trusteeship Council is thus based upon two classes of States equal in number, i.e. those which administer trust territories and those which do not. These two groups consist of the following three categories of States: States administering trust territories, such permanent members of the Security Council as are not administering trust territories, and as many States elected by the General Assembly as may be necessary to ensure

[1] The footnote to this Rule reads as follows: 'Rule based directly on a provision of the Charter (Article 86, paragraph 1 (*c*).'

[2] See the Memorandum prepared by the Secretariat on *Conditions Necessary for the Constitution of the Trusteeship Council*, A/86. [3] Article 61. [4] Article 23.

[5] The Statute of the International Court of Justice, Articles 3, 13–15.

parity in the membership of the Trusteeship Council between States which administer trust territories and those which do not.[1]

Problems

The problems with which this paper is concerned are entirely novel,[2] for it is only recently, in the year 1960, that the first trust territories have attained independence. In view of these developments, the General Assembly of the United Nations at its fourteenth session in 1959 was faced, in connexion with item 17 of its Agenda entitled 'Election of Two Members of the Trusteeship Council' with the question of how to maintain and reconcile the twin principles upon which under Article 86, the composition of the Council is based at the time when trust territories attain independence before the expiration of the terms of office of the elected members of the Council. These principles of course are parity between the number of States which administer trust territories and those which do not, and the election of the latter category of States for three-year terms of office.

While this was the immediate issue with which the General Assembly was faced, further ahead looms the dilemma of the future composition of the Trusteeship Council when more and more trust territories will have attained independence, so that the number of permanent members of the Security Council not administering trust territories will have exceeded the number of States administering trust territories. In view of the unexpectedly rapid progress in the attainment of independence by trust territories, the United Nations Organization may be faced with this development in the very near future. In this event, not only will the third category of members of the Trusteeship Council, i.e. that of non-administering States elected by the General Assembly for three-year terms in accordance with Article 86 (1) (*c*) entirely disappear, but it will no longer be possible to maintain the principle of parity.

Will the Trusteeship Council be legally constituted even if parity can no longer be maintained? Will the Trusteeship Council eventually be dissolved despite the absence of any provision in the Charter dealing with such an eventuality, and if so, when?

Travaux Préparatoires of Article 86

In order to put the text of Article 86 in its proper perspective, there is value in the examination of its *travaux préparatoires*.

[1] See also Kelsen, *The Law of the United Nations* (1950), p. 662.

[2] See also Schwelb, 'Charter Review and Charter Amendment—Developments in 1958 and 1959', in the *International and Comparative Law Quarterly*, 9 (1960), p. 237, at pp. 250–2; Bailey, 'The Future Composition of the Trusteeship Council', *International Organization*, 8 (1959), p. 412; Toussaint, *The Trusteeship System of the United Nations* (1956), pp. 163–5.

'Even Homer nods', said Sir Andrew Cohen, the representative of the United Kingdom in the course of the discussion which took place during the fourteenth session of the General Assembly concerning the above-mentioned item 17 of its Agenda, thus admitting that 'when Article 86 of the Charter was drafted, a situation in which administering members of the Council ceased to administer Trust Territories during the term of office of elected members was not foreseen'.[1] The examination of the *travaux préparatoires* of Article 86 indicates that the Founding Fathers of the Charter nodded more than once while elaborating this Article.[2]

The Dumbarton Oaks Proposals for a General International Organization[3] did not contain any text comparable to that of Article 86. The only organs contemplated in Dumbarton Oaks were the General Assembly, the Security Council, the International Court of Justice and the Secretariat, as principal organs, and the Economic and Social Council which was to function under the authority of the General Assembly.[4] Among the amendments to the Dumbarton Oaks Proposals suggested by the United States at San Francisco, however, was an additional Chapter entitled 'Arrangements for International Trusteeship',[5] which contained the following Article 9:

'In order to assist the General Assembly to carry out those functions under the trusteeship system not reserved to the Security Council, there should be established a Trusteeship Council which would operate under its authority. The Trusteeship Council should consist of specially qualified representatives, designated (*a*) one each by the states administering trust territories; and (*b*) one each by an equal number of other states named for three-year periods by the General Assembly.'[6]

[1] G.A.O.R., Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 769.

[2] Regarding deficient drafting of the Charter, see, generally, Robinson, 'Metamorphosis of the United Nations', *Recueil des Cours*, 34 (1958—II), p. 548.

[3] For the text see *U.N.C.I.O.*, vol. 3, pp. 2–23.

[4] See also the statement of the Delegate of the United States made on 15 May 1945 before Committee II/4 in San Francisco, in which he referred to 'the well-known fact that we do not have a Chapter of the Dumbarton Oaks Proposals on this subject', *U.N.C.I.O.*, vol. 10, p. 447. For a similar statement see the Report of the Rapporteur of Committee II/4, ibid., p. 607. Regarding the decision not to discuss the subject of trusteeship at Dumbarton Oaks, see Russell, *A History of the United Nations Charter, the Role of the United States 1940–1945* (1958), pp. 346–8.

[5] For the development of proposals for the establishment of the Trusteeship System and Council, see Russell, op. cit., this page, n. 4, chapters 4, 8, 13, 20, 21, 23 and 31.

[6] *U.N.C.I.O.*, vol. 3, pp. 600, 608. Similar proposals were made by China, ibid., p. 616, and France, ibid., p. 606. See also ibid., vol. 10, p. 650. It is interesting to observe that a technical committee of the State Department prepared in 1944 a plan according to which the Trusteeship Commission would include automatically representatives of States administering trust territories, together with an equal number, plus one, of representatives of non-administering States elected by the General Assembly. 'Although its composition made it a political organ, rather than primarily an expert group, it was expected that governments would appoint individuals of special competence for the discharge of their duties. The Commission, it was hoped, would thus retain at least some of the advantages of expertness that had characterized the Permanent Mandates Commission.' However, the Informal Political Agenda Group altered the proposed composition of the Trusteeship Commission so that it should consist of an equal number of representatives from administering and non-administering States. 'There may well have been a feeling that the mandatory powers would be more likely to accept a commission that was not openly weighted against them'. Russell, op. cit., this page, n. 4, pp. 342–3.

The Soviet delegation proposed an amendment to the United States proposal, according to which the Trusteeship Council was to consist of

'specially qualified representatives, designated (*a*) one each by the states administering trust territories, and by the permanent members of the Security Council not administering trust territories; and (*b*) one each by an equal number of other states named for three-year periods by the General Assembly.'[1]

On the basis of the proposals 'submitted individually by the four sponsoring governments, France and Australia and . . . the general comments of Mexico',[2] the delegation of the United States presented to Committee II/4 of the United Nations Conference on International Organization 'a proposed working paper on the subject of International Trusteeship'.[3] This 'Proposed Working Paper for Chapter on Dependent Territories and Arrangements for International Trusteeship'[4] was adopted by the Committee as the basis for its discussions.[5] It contained a suggested provision (paragraph B. 11) for the establishment of the Trusteeship Council, which was based on the above-quoted Article 9 of the United States proposed 'Arrangements for International Trusteeship'. It provided as follows:

'In order to assist the General Assembly to carry out those functions under the Trusteeship system not reserved to the Security Council, there should be established a Trusteeship Council which . . . should consist of specially qualified representatives, designated (*a*) one each by the states administering trust territories, and (*b*) one each by an equal number of other states named for three-year periods by the General Assembly.'[6]

It thus appears that from the very beginning both the idea of parity and that of the election of non-administering States for three-year terms were intended by the draftsmen of the Charter. However, a closer examination of the text of paragraph, B. 11 of the Working Paper quoted above shows that *on its very terms* parity could not always be maintained between administering and non-administering States. The draftsmen did not provide for the case of the attainment of independence by a trust territory during the terms of office of the elected members of the Council. Should such an event occur and consequently an administering State cease to be a member of the Council, a lack of balance would ensue until the term of office of one of the elected members of the Council would expire, upon which event parity could be restored by not electing to the Council another State in the stead of the State whose term of office had expired. On the other hand, the text of the Working Paper could be commended on two grounds. First, such lack of parity as could ensue in the above-mentioned event would be temporary only. Secondly, no difficulty could arise regarding the eventual dissolution of the Trusteeship Council owing to the attainment of independence by all trust territories.

[1] *U.N.C.I.O.*, vol. 3, p. 619. See also ibid., vol. 10, pp. 441, 673.
[2] Ibid., vol. 10, p. 439.
[3] Ibid., p. 447.
[4] For the text see ibid., p. 677.
[5] Ibid., p. 447. See also ibid., pp. 607–8.
[6] Ibid., p. 679.

However, the position was greatly complicated by the request quoted above of the Soviet delegation to include in the membership of the Trusteeship Council all permanent members of the Security Council. In the Thirteenth Meeting of Committee II/4, on 8 June 1945, the delegate for the United States introduced an amendment to paragraph 11 of the Working Paper, to the effect that everything after the word 'territories' should be deleted and that a semi-colon and the following be added:

'(*b*) one each by the states named in Chapter VI, Section A, which are not administering trust territories; and (*c*) one each by a sufficient number of other states named for three-year periods by the General Assembly so that the total number of representatives is equally divided between administering and non-administering states.'[1]

This revised text, which formed the basis of the final Article 86, met the Soviet wishes for permanent representation of the major powers.[2] The delegate of Egypt objected to this proposal, and suggested instead that the words 'elected and non-elected' should be substituted for the words 'administering and non-administering'.[3] He[4] must ~~have~~ believed that the delicate political balance on the Council between members administering trust territories and members elected by the General Assembly would be destroyed, for, the record says: 'it was argued that the permanent members of the Security Council resemble the administering states in that they were interested parties, and that the peoples of the trust territories will be better protected if half the seats on the Trusteeship Council were held by elected members.' As against the Egyptian view it was argued 'that there was no distinction in humanitarian purpose between the three categories mentioned in the paragraph, but only of practical experience, and that what was required on the Trusteeship Council was the greatest possible sum of knowledge and wisdom'. In the vote which followed, the United States amendment to the text of the Working Paper was adopted by 35 votes to 2.[5]

It thus appears that in the course of the revision of the original proposal regarding the composition of the Trusteeship Council as contained in the Working Paper, the draftsmen overlooked the necessity to make adequate

[1] Ibid., pp. 516–17.

[2] See also Russell, op. cit., above, p. 253, n. 4, p. 840.

[3] *U.N.C.I.O.*, vol. 10, p. 517.

[4] Also in the discussion of the draft Report of the Rapporteur of Committee II/4, the Egyptian delegate expressed hesitations about the political lack of balance in the membership of the Trusteeship Council. He stated: 'we considered that the Trusteeship Council is an organ of the Assembly, and therefore the Assembly should have a far greater hand in nominating its members than is now provided by this Chapter which enables the Assembly only to nominate a minority of the members of the Trusteeship Council.' *U.N.C.I.O.*, vol. 8, p. 125, at p. 148.

[5] Ibid., vol. 10, p. 513, at p. 517. See also Goodrich and Hambro, *Charter of the United Nations* (2nd ed., 1949), p. 463; Russell (op. cit., above, p. 253, n. 4, p. 841) commented upon the Egyptian proposal as follows: 'This would have meant, whenever there were great powers eligible to automatic membership under (*b*) above, that the total of non-administering States would surpass that of administering powers on the Council.'

provision for the maintenance of parity between administering and non-administering members. While, as pointed out above, even the text contained in the original Working Paper did not provide for perfect parity, the text as finally adopted by Committee II/4 not only did not overcome this original imperfection but, owing to the inclusion of permanent members of the Security Council in the membership of the Trusteeship Council, opened the door to the eventual disappearance of the entire category of the elected members of the Council as well as to future permanent lack of parity between States administering trust territories and non-administering States. These eventualities would occur when such a number of trust territories would have attained independence that the number of permanent members of the Security Council not administering trust territories would have exceeded the number of administering States.

In the political atmosphere of our times, which in recent years and months have borne witness to the attainment of independence by very many States, including trust territories, it is difficult to comprehend how the draftsmen of the Charter did not take into consideration the attainment of independence by trust territories, and did not make specific provision for it. This is particularly surprising in view of Article 76 (*b*) of the Charter which defines among the basic objectives of the trusteeship system that of promoting 'the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence'. Yet it is a fact that such provision has not been made. In vain shall we look in the *travaux préparatoires* for an answer to the question of how to maintain the principles upon which Article 86 is founded at the time of the attainment of independence by a growing number of trust territories, or to the question of how eventually, if at all, the Council will be dissolved.

Yet, it is interesting to observe that the possibility of the termination of a trust was not entirely unnoticed in San Francisco. In the course of the discussion of paragraph B. 10 of the Working Paper[1]

'it was pointed out that the working paper did not include provision for the termination of a trust or for its transfer from one administering authority to another. The views were expressed that there could be no compulsory transfer except as a consequence of a breach of the peace, *and that the termination of a trust would occur when the dependent state concerned became a member of the international organization.*'[2]

Further to this discussion, Egypt proposed to add to the Chapter on Trusteeship certain provisions, which included the following:

'2. That in all trust territories, within its competence, the General Assembly shall

[1] Now Article 85 (1) of the Charter.

[2] *U.N.C.I.O.*, vol. 10, p. 506. Italics supplied. The absence of any provisions relating to the termination of a trust was noticed also by the Secretariat in its 'Analysis of Papers presented by Australia, China, France, United Kingdom and United States', ibid., p. 641 at p. 655.

have the power to terminate the status of trusteeship, and declare the territory to be fit for full independence, either at the instance of the Administering Authority, or upon the recommendation of any member of the Assembly.

'3. That whenever there is any violation of the terms of the trusteeship arrangements by the administering authority, or when the administering power has ceased to be a member of the United Nations, or has been suspended from membership, the Organization shall take the necessary steps for the transfer of the territory under trusteeship to another administering authority. . . .'[1]

In favour of the Egyptian proposal it was said in Committee II/4 'that it was intended to fill a gap in the Charter on trusteeship which contained no provisions relating to the termination of a trusteeship'.[2] Against the Egyptian proposal it was argued

'that a provision for the termination or transfer of a trusteeship without the consent of the trustee power would be contrary to the voluntary basis upon which the trusteeship proposals had been built. In some cases details with regard to termination through independence might be included in the trust agreement. However, experience under the League had shown that *provision for termination of trusteeship was unnecessary and might be left to individual agreements*.[3]

The Chairman asked the delegates of the United States and the United Kingdom for

'an authoritative statement, which could be included in the Rapporteur's report, on the following questions: If a state withdraws from the United Nations Organization and continues to hold a trust territory under the Charter, how is the Organization to continue to exercise its responsibilities with respect to the administration of that trust territory? And if a State administering trust territory commits an act of aggression, what consequences will follow in relation to its trust?'[4]

The delegate of Egypt stated that 'he would not press his motion'.[5] Further to the Chairman's request, the delegates of the United States and the United Kingdom presented the joint replies of their Governments to the above questions. These replies did not deal with the termination of a trust through the attainment of independence by a trust territory.[6]

In conclusion it is interesting to observe that while the possibility of the termination of a trust through the attainment of independence by the trust territory was not entirely overlooked in San Francisco, Committee II/4 did not deem it necessary to make special provision for it. This may have been due to several considerations. First, this possibility appeared to be very remote.[7] Secondly, it was discussed in connexion with paragraph B. 10 of the Working Paper, dealing with the functions of the General Assembly with regard to the trusteeship agreements, and not in connexion with paragraph B. 11, dealing with the composition of the Trusteeship

[1] Ibid., p. 510.
[2] Ibid., p. 547.
[3] Ibid., pp. 547–8. Italics supplied.
[4] Ibid., p. 548.
[5] Ibid.
[6] Ibid., pp. 601, 620–1.
[7] See also Bailey, loc. cit., above, p. 252, n. 2, p. 413.

Council. Thirdly, the question of termination of a trust through the attainment of independence was only of secondary importance: the Committee was mainly interested in the question of the effect upon the trust of a withdrawal of an administering State from the Organization and of the commission of acts of aggression by an administering authority. At the same time the question of the effect of the attainment of independence upon the composition of the Trusteeship Council was entirely overlooked, and the *travaux préparatoires* throw no light upon the problems with which this paper is concerned.

On the basis of an examination of the *travaux préparatoires* it is also difficult to form an opinion regarding the relative importance of the principle of parity *vis-à-vis* that of elections for a three-year term of office. The founders of the Charter, obviously motivated by the desire to base the Trusteeship Council on a sound political footing, approved from the very beginning of the principle of parity, but also of the three-year terms of office of the elected members of the Council. Were parity the only guiding principle, they could have made provision for some synchronization of periods of office of the elected members of the Council with those of the administering States rather than provide for a fixed term of office. However, no provision aimed at the maintenance of permanent parity was made. It is possible that in providing for the terms of office of three-years' duration, the draftsmen may have been motivated by the consideration that shorter terms of office would not have enabled the specially designated 'qualified persons' representing on the Council the member States to master the important matters which the Charter entrusted to the Trusteeship Council. It may be recalled that the Charter provides for similar terms of office of the elected members of the Economic and Social Council.[1] Retiring members of the Economic and Social Council may, just as in the case of the Trusteeship Council, be eligible for immediate re-election. This may be compared with the provision for election of the non-permanent members of the Security Council whose term of office is two years only and who are not eligible for immediate re-election.[2]

The British Memorandum on the Composition of the Trusteeship Council

The problems of interest to this paper were next discussed in the Memorandum on the composition of the Trusteeship Council submitted on 15 September 1945 by the delegation of the United Kingdom to the Preparatory Commission of the United Nations.[3] It was primarily concerned with the question of the initial constitution of the Trusteeship

[1] Article 61 (2). [2] Article 23 (2). [3] PC/EX/TC/4.

Council, which question will be further considered below, but it dealt also with the question of the future composition of the Council.

The relevant parts of the Memorandum are herewith quoted:

'5. *Future Membership*

Later on, as trusteeship agreements are approved, the membership will adjust itself naturally. The changes in the composition of the Council (apart from the triennial changes among the elected Members) are analysed below.

(*a*) *Additions to the list of Members administering trust territories.*

(i) *A non-administering state which has a permanent seat on the Trusteeship Council under Art. 86 (1) (b).*

Each such change will involve an increase in the size of the Council by the addition of two new elected members, one to fill the seat hitherto occupied by a permanent "non-administering" member, and one to fill the new seat made necessary to maintain the balance between administering and non-administering states.

(ii) *An elected member.*

This would also involve an increase of two in the membership of the Council, namely one replacement and one new seat to balance the additional administering state. Both new members would be elected under Art. 86 (1) (*c*).

(iii) *A state not already a Member of the Council.*

This, though also increasing total membership by two, would involve only one election under Art. 86 (1) (*c*), i.e. to balance the new Administering State.

(*b*) *Reductions in the number of Members administering trust territories.*

(i) *A Member which is entitled to a permanent seat.*

If such a Member ceased to be an Administering State, she would displace two elected members; one because the total number of "non-administering" members would have to be reduced by one to maintain equality between the numbers of administering and non-administering states, and a second in order to provide her with a seat in the reduced number now available. The decision which elected member should lose her seat would presumably lie with the General Assembly.

(ii) *A Member which is not entitled to a permanent seat.*

If such a Member ceased to be an Administering State, she would lose her seat on the Council unless subsequently elected; and the reduction of the number of Administering States by one would in this case involve only one displacement among the elected members.'

No comments are called for as regards part (*a*) of the above paragraph 5, except for the one observation that while envisaging 'natural adjustment' of the membership of the Council, the Memorandum does not appear to have assumed complete synchronization between a new administering State joining the Council and the election to the Council of the additional non-administering State. The Memorandum apparently assumed that while

parity is necessary, it must not necessarily be perfect at all times, and that it would suffice if in the normal course of the activities of the General Assembly the additional non-administering State were elected and parity re-established.

As regards part (*b*) of paragraph 5 it is difficult to see what would be the legal basis for the assumption that the General Assembly would be competent to decide 'which elected member should lose her seat'.

In considering the value of the views expressed in the Memorandum, two observations may be made. On the one hand, it is suggested that though not coming within the framework of the *travaux préparatoires*, the documents of the Preparatory Commission of the United Nations may have a particular significance because the Preparatory Commission was a direct continuation of the United Nations Conference on International Organization. There is some value, therefore, in the views expressed by the United Kingdom delegation in the Preparatory Commission in the period between the signature of the Charter and its ratification. On the other hand, attention is called to the following statement made by Sir Andrew Cohen, the representative of the United Kingdom, concerning part (*b*), paragraph 5 of the Memorandum, in the course of the discussion which took place at the fourteenth session of the General Assembly concerning item 17 of its Agenda:

'. . . circumstances change, and when we are fully faced with the practical issue which we now face, it is perfectly legitimate to take a different view from the view we took then.

'. . . Indeed, when this memorandum was sent by the United Kingdom Government to the Preparatory Commission, not a single delegation, as far as we are aware, even discussed the matter. At that time everyone was interested in one thing and one thing only, namely, the establishment of the Trusteeship System and the setting up of the Trusteeship Council. The memorandum which has been referred to did not deal with the problem which we are now facing, namely, the situation in which a trusteeship agreement is terminated during the three-year term of an elected member.'[1]

The Establishment of the Trusteeship Council

The imperfections inherent in the provisions of the Charter concerning the composition of the Trusteeship Council became apparent as soon as the question of the initial establishment of the Council arose. In the above-mentioned Memorandum submitted by the delegation of the United Kingdom to the Preparatory Commission of the United Nations, the difficulties involved in the establishment of the Council were summarized as follows:

'Half the Members of the Council will be those Members of the United Nations which administer Trust Territories. The term "Trust Territories" means such

[1] G.A.O.R., Fourteenth Session, 857 Plenary Meeting, 12 December 1959, p. 769.

territories as may, by subsequent individual agreement, be placed under the international trusteeship system (Art. 75 and 77). At present therefore there are no Trust Territories, nor will there be any until trusteeship agreements for individual territories have been approved by the General Assembly, or, in the case of strategic areas, by the Security Council (Arts. 85 and 83). Consequently there are at present no Members of the United Nations administering trust territories; and therefore a Trusteeship Council composed exactly as laid down in Art. 86 of the Charter cannot yet be formed. Conversely, it might be held that no territories can be placed under trusteeship until there is a Trusteeship Council to advise the General Assembly (or Security Council) on the terms of the trusteeship agreements as required by Art. 85, para. 2 (or Art. 83).'

The difficulties were therefore twofold: first, how to establish a Trusteeship Council based on the principle of parity, as required by Article 86 of the Charter, before the approval of a sufficient number of trust agreements by the General Assembly; and secondly, how to break the vicious circle created by Articles 85 (and 83) of the Charter. The Executive Committee of the Preparatory Commission of the United Nations recommended to the Commission that the General Assembly, acting under Article 22 of the Charter, create a temporary subsidiary organ to carry out some of the functions assigned by the Charter to the Trusteeship Council, pending the establishment of the Council. That Temporary Trusteeship Committee would, *inter alia*, assist the Organization in expediting the conclusion of trusteeship agreements.[1] In the Fourth Committee of the Preparatory Commission the representative of Australia summarized three other methods of solving the difficulties, in addition to the recommendation of the Executive Committee: (*a*) initial membership of the Trusteeship Council should be limited to the five permanent members of the Security Council;[2] (*b*) the 'States directly concerned' should provisionally approve a number of trusteeship agreements, so as to allow the Trusteeship Council to be formed without waiting for the approval of the General Assembly; (*c*) certain States should express their intention of placing territories under the trusteeship system and thus be regarded as administering authorities.[3] In the course of the discussions in Committee IV, objections were made to the proposal for the establishment of the Temporary Trusteeship Committee on the grounds that such action was not authorized by the Charter and would thus be unconstitutional. Instead of adopting the recommendation of its Executive Committee, the Preparatory Commission recommended

[1] *Report by the Executive Committee to the Preparatory Commission of the United Nations*, PC/EX/113/Rev.1, pp. 55, 56. This recommendation was objected to by the Czechoslovak, Yugoslav and Soviet delegations.

[2] In its above-mentioned Memorandum the United Kingdom delegation suggested that this would not be likely to be acceptable to other States qualifying for the membership of the Council and particularly to the present Mandatory Powers, who though not among the five States referred to in Article 86 (1) (*b*), nevertheless intend to place territories under trusteeship and would want to be present as voting members during the discussion of the draft trusteeship agreements.

[3] *United Nations Preparatory Commission, Committee 4: Trusteeship*, PC/TC/2, p. 2.

to the General Assembly that it should call on the States administering territories under mandates to take practical steps for the implementation of Article 79 of the Charter, in order to submit trusteeship agreements for approval, preferably not later than during the Second Part of the First Sessions of the General Assembly, and that the trusteeship matters which would be taken up by the General Assembly at the First Part of its First Session for the purpose of establishing the trusteeship system, be 'considered by the Trusteeship Committee of the General Assembly, using the methods which the General Assembly consider as most appropriate for the further consideration of these matters'.[1] Thus, rather than establish a temporary body, to which objections on legal grounds were taken, it was decided to make use of one of the Main Committees of the General Assembly—the Trusteeship Committee (Fourth Committee)—and to leave to the General Assembly itself the decision whether to establish a temporary body. The Preparatory Commission may have felt that, in view of the imperfections of the Charter, the General Assembly was free to avail itself of the assistance of its Trusteeship Committee rather than aim at the impossible—the assistance of the Trusteeship Council under Article 85—which would frustrate the constitution of the Council.

It is interesting to observe that in the course of the discussions which took place in the Fourth Committee of the Preparatory Commission, two views were expressed concerning the initial establishment of the Council with reference to the principle of parity. The representative of Yugoslavia suggested that the Trusteeship Council be established as soon as one trusteeship agreement had been concluded, and argued that 'The balance provided for in Article 86 . . . was not a condition for the existence of the Trusteeship Council, but simply a measure according to which the composition of the Trusteeship Council would be determined when it reached its full development'.[2] On the other hand, the representative of the United States argued that the draftsmen of the Charter made it very clear 'that the balance between administering and non-administering States was an essential element in the constitution of the Trusteeship Council'. He asked the representative of Yugoslavia 'what would happen if in fact there were not enough trusteeship agreements for this balance to be established on conclusion of the First Session of the General Assembly, and who would look after such territories as had been placed under the trusteeship system in the absence of the Trusteeship Council'.[3]

[1] *Report of the Preparatory Commission of the United Nations*, PC/20, p. 49.

[2] PC/TC/31, p. 22. Cf. with the earlier view of the representative of Yugoslavia that 'the minimum necessary trusteeship agreements would be two concluded by two permanent members of the Security Council and one concluded by one other Power'. PC/TC/2, p. 34.

[3] Ibid., p. 23. The representative of China also expressed doubts as to the soundness of the suggestion that one agreement would suffice for bringing the Trusteeship Council into being. PC/TC/32, p. 27.

On 13 December 1946 the General Assembly adopted, upon the recommendation of its Fourth Committee, Resolution 63 (I) by which it approved eight trusteeship agreements.[1] On the following day the General Assembly adopted Resolution 64 (I) in which, noting its previous Resolution, it held that 'The conditions necessary for the constitution of the Trusteeship Council can thus be fulfilled', referred to the members of the Council by virtue of Articles 86 (1) (*a*) and (*b*), and decided in accordance with Article 86 (1) (*c*) to elect Mexico and Iraq as members of the Council for a term of three years.

A pragmatical approach thus made it possible for the General Assembly to overcome the constitutional impasse resulting from the imperfections of the Charter and to bring the Trusteeship Council into being. While no definite conclusions can be drawn, it appears that the feeling of the Preparatory Commission, as well as that of the General Assembly, was that parity on the Council must exist as soon as the Council was established. Parity may thus have been regarded a necessary condition for the constitution of the Trusteeship Council.[2]

Practice of the Organization—Changes (other than Triennial) in the Membership of the Council

1. *Changes by Reason of Entry into Force of Additional Trusteeship Agreements*

On 18 July 1947 the Trusteeship Agreement for the Trust Territory of the Pacific Islands came into force. Since the United States was designated as the Administering Authority in this Agreement, its status in the Council changed from that of a non-administering (permanent member of the Security Council) member of the Trusteeship Council to that of an administering member. In order to restore parity, it became necessary for the General Assembly to elect two additional members. The General

[1] For the texts of the Agreements, see *Official Records of the Second Part of the First Session of the General Assembly*, Supplement, No. 5.

[2] See the Memorandum prepared by the Secretariat on *Conditions Necessary for the Constitution of the Trusteeship Council*, in which it is stated that 'the conditions necessary for the constitution of the Trusteeship Council will have been fulfilled:

(*a*) when there is equality of numbers between the administering and non-administering States referred to in Article 86, paragraph 1 (*a*), (*b*); or

(*b*) when such equality can be established by means of election of non-administering members as provided for in Article 86, paragraph 1 (*c*).' A/86.

See also the *Report of the Secretary-General on the Work of the Organization*, Supplement, First Session of the General Assembly, A/65, p. 33. In his Report on Trusteeship Arrangements, the Secretary-General made the following statement: 'The number of agreements now before the General Assembly and the administering authorities designated therein are more than the minimum number required for the establishment of the Trusteeship Council. . . . When agreements in sufficient number are approved by the General Assembly the essential conditions for the establishment of the Trusteeship Council will have been met and that Council will come into being.' *Report of the Secretary-General on Trusteeship Arrangements*, A/135, G.A.O.R., 61st Plenary Meeting, 17 December 1946, pp. 614 et seq.

Assembly therefore elected, at its 109th Plenary Meeting on 13 November 1947, Costa Rica and the Philippines as members of the Trusteeship Council.[1] It is interesting to observe that from 18 July 1947 until 13 November 1947 the number of States administering trust territories in the Trusteeship Council exceeded that of non-administering States.[2] No one appears to have felt that this temporary lack of parity violated the provisions of Article 86, and no attempt was made to convene a special session of the General Assembly in order to restore immediately the disturbed balance of membership.[3]

Italy, though not a Member of the United Nations, was invited to participate in the work of the Trusteeship Council since, under General Assembly Resolution 289 A (IV), it had been designated as the administering authority for the trust territory of Somaliland. Upon the approval by the General Assembly (Resolution 442 (V)) of the Trusteeship Agreement for the Territory of Somaliland, Italy became the administering authority for that territory. Its participation in the work of the Council was made possible by the adoption by the Council at its Eighth Session of supplementary Rules A to H.[4] At the Tenth Session of the General Assembly, on 14 December 1955, Italy was admitted to membership in the United Nations and became a member of the Trusteeship Council by virtue of Article 86 (1) (*a*) (as the administering authority for Somaliland under Italian administration). As a result, the parity on the Council was again disrupted, and in order to restore it the General Assembly, at its 559th Meeting on 16 December 1955, elected Burma as an additional non-administering member of the Council.[5]

In regard to both the case of the United States and that of Italy, it may be pointed out that under Rule 148 of the General Assembly's Rules of Procedure the members elected take their office immediately upon their election, and not upon 1 January following their election. Rule 148 thus reduces to the minimum the duration of lack of parity on the Council.

[1] *Trusteeship Council, Report to the General Assembly*, General Assembly, Third Session, Supplement No. 4, A/603, p. 1.

[2] The statement of Kelsen that 'the number of members which do not administer a trust territory in spite of the provisions of Article 86, paragraph 1, clause (*c*), may be greater, but never can be smaller, than the number of those which do. The administering members can have no majority' (op. cit., above, p. 252, n. 1, p. 663), is thus not accurate.

[3] The Trusteeship Council was not in session between 18 July and 13 November 1947. *Trusteeship Council, Report to the General Assembly*, General Assembly, Second Session, Supplement No. 4, A/312.

It is pointed out that the principle of parity is observed in the composition of all the subsidiary organs of the Council. *Repertory of Practice of United Nations Organs*, vol. 4, Article 86, para. 23; ibid., Supplement, No. 1, vol. 2, Article 86, para. 10.

[4] See ibid., vol. 4, Article 86, paras. 24–42.

[5] See ibid., Supplement, No. 1, Article 86, para. 8. *Trusteeship Council, Report to the General Assembly*, General Assembly, Eleventh Session, Supplement, No. 4, A/3170, p. 1. The Trusteeship Council was not in session between 14 and 16 December 1955. Ibid.

2. *Changes by Reason of Resignation before the Expiration of the Triennial Term of Office*

Costa Rica, whose membership in the Trusteeship Council was not due to expire until 31 December 1950, resigned on 13 September 1949. In accordance with Rule 129[1] of its Rules of Procedure, the General Assembly at its 231st Plenary Meeting on 20 October 1949 elected the Dominican Republic for the unexpired term of Costa Rica, namely, from the date of the election until 31 December 1950.[2] There was a lack of parity therefore between 13 September 1949 and 20 October 1949.[3]

Argentina, which was due to retire on 31 December 1952, resigned with effect from 1 January 1952.[4] In order to restore the parity on the Council, the Sixth Session of the General Assembly, at its 356th meeting on 20 December 1951, elected El Salvador to fill the remainder of Argentina's term of office. It follows that no lack of parity existed in this case.

In conclusion it may be said that parity has not in the past always been maintained on the Council. There have been brief periods of lack of parity. It has not been suggested that they have rendered the composition of the Council illegal. Immediate restoration of parity has not been deemed essential or always possible.

Rule 129 which was expressly referred to by the President of the General Assembly preceding the election of the Dominican Republic for the unexpired term of Costa Rica, is identical with the present Rule 141. The General Assembly thus followed its own Rules of Procedure concerning by-elections rather than elect the new members for the period prescribed in Article 86 (1) (*c*). By so doing, the General Assembly must have interpreted Article 86 (1) (*c*) as one concerning original elections only, and not by-elections. Rule 141 reflects, no doubt, the practice of the General Assembly in relation to resignation of members from all the councils of the Organization. It thus supplements the deficiency of the Charter resulting from the absence of a provision concerning by-elections, similar to that of Article 15 of the Statute of the International Court of Justice, which provides that 'A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term'.

Does Rule 141 conflict with Article 86 of the Charter? If the answer to

[1] This Rule is identical with the present Rule 141.

[2] See *Trusteeship Council, Report to the General Assembly*, General Assembly, Fifth Session, Supplement, No. 4, A/1306, p. 1; G.A.O.R., Fourth Session, 231st Plenary Meeting, 20 October 1949, paras. 23–25.

[3] A session of the Council was held on 27 September 1949. A/1306, n. 2 above on this page, p. 1.

[4] *Trusteeship Council, Report to the General Assembly*, General Assembly, Seventh Session, Supplement, No. 4, A/2150, p. 1.

this question is in the affirmative, the Rule would be illegal. It is a truism to observe that the Rules of Procedure of the organs of the Organization are subordinate to the Charter and may operate only within the bounds of the Charter. It may be pointed out in this connexion that one of the questions submitted by the General Assembly's Resolution 904 (IX) to the International Court of Justice for an advisory opinion was whether the General Assembly's Special Rule F, which concerns the voting procedure to be followed by the Assembly in the examination of reports and petitions relating to the Territory of South-West Africa, is a correct interpretation of the Advisory Opinion on the *International Status of South-West Africa* given by the Court on 11 July 1950.[1] In its Advisory Opinion on the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa* of 7 June 1955, the Court indicated the limits of the legality of the General Assembly's Rules of Procedure. It observed that

'It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find the rules governing the making of its decisions in connection with those functions. It would be legally impossible for the General Assembly, on the one hand, to rely on the Charter in receiving and examining reports and petitions concerning South-West Africa, and, on the other hand, to reach decisions relating to these reports and petitions in accordance with a voting system entirely alien to that prescribed by the Charter. . . .[2]

'The Opinion of 1950 left the General Assembly with Article 18 of the Charter as the sole legal basis for the voting system applicable to decisions in connection with its supervisory functions. It was on that basis that Rule F was adopted. In adopting that Rule, the General Assembly acted within the bounds of legal possibility.'[3]

In its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*,[4] the Court recognized the value of the Rules[5] for the interpretation of the provisions of the Charter by the organ charged with their implementation. It attached importance to the fact that

'The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only "if the Security Council recommends the applicant State for membership" (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126).'[6]

[1] *I.C.J. Reports*, 1950, p. 128.
[2] Ibid., 1955, p. 67 at p. 76.
[3] Ibid., at p. 77.
[4] Ibid., 1950, p. 4.
[5] See, generally, Tammes, 'Decisions of International Organs as a Source of International Law', *Recueil des Cours*, 94 (1958—II), p. 548.
[6] *I.C.J. Reports*, 1950, p. 4 at p. 9.

Commenting upon this statement, Lauterpacht suggested that 'the Court equated with "subsequent conduct" the uniform practice pursued by the organs of the Organisation established by the authors of the Charter and acquiesced in by them.'[1]

Rule 141 may thus reflect the interpretation of the General Assembly that Article 86 (1) (*c*) of the Charter relates to original elections only. There is no reason to assume the existence of a conflict between these two provisions, which concern different matters. Another consideration which can be adduced in support of the legality of the Rule is that the election of the new member of the Council for the unexpired term of the retiring member is based upon the consent of the candidate to be elected for a period of shorter duration than that prescribed by the Charter for the original election.

3. *Changes by Reason of Attainment of Independence by Trust Territories*

The General Assembly of the United Nations was faced with this problem for the first time during its Fourteenth Session. The position regarding trust territories during that Session was as follows:

Trust territory	*Administering authority*	*Expected date of attainment of independence*
Tanganyika . . .	United Kingdom	Not yet known[2]
Ruanda-Urundi . .	Belgium	Not yet known[3]
Cameroons under British administration . .	United Kingdom	Possibly 1961[4]
Cameroons under French administration . .	France	1 January 1960[5]
Togoland under French administration . .	France	27 April 1960[6]
New Guinea . .	Australia	Not yet known[7]
Nauru. . . .	Australia, New Zealand and United Kingdom	Not yet known[8]
Trust Territory of the Pacific Islands . .	United States	Not yet known[9]
Somaliland under Italian administration . .	Italy	1 July 1960[10]
Western Samoa . .	New Zealand	31 December 1961[11]

[1] Lauterpacht, *The Development of International Law by the International Court* (1958), p. 171.

[2] *Trusteeship Council, Report to the General Assembly*, General Assembly, Fourteenth Session, Supplement, No. 4, A/4100, p. 41; *Report of the Fourth Committee to the General Assembly*, Fourteenth Session, A/4320, p. 39.

[3] A/4100, above, n. 2 on this page, p. 60; A/4320, ibid., p. 39.

[4] A/4100, ibid., pp. 88–91; A/4320, ibid., p. 39.

[5] A/4100, ibid., p. 100.

[6] A/4100, ibid., pp. 107–8; A/4320, ibid., p. 41.

[7] A/4100, ibid., p. 153.

[8] Ibid., p. 166.

[9] S/4206.

[10] A/4320, this page, n. 2, p. 43.

[11] A/4100, ibid., p. 131; A/4320, ibid., p. 39.

By the end of 1959 there were therefore seven administering States, and seven non-administering States: China and the U.S.S.R., as permanent members of the Security Council, and five States elected by the General Assembly, namely, Haiti, India, Burma, Paraguay and the United Arab Republic. Since Haiti and India were due to retire as members of the Council on 31 December 1959, the General Assembly had, in accordance with Article 86 of the Charter and Rules 149 and 150 of its Rules of Procedure, to elect two members in their stead, and after a lengthy deliberation, which will be considered below, elected Bolivia and India as members of the Council for three-year terms.[1]

Since no elected members have voluntarily resigned from the Council, the situation since July 1960 has been that the Trusteeship Council consists of five States administering trust territories (Australia, Belgium, New Zealand, United Kingdom and the U.S.A.) and eight non-administering members (China, the U.S.S.R., France, Bolivia, India, Burma, Paraguay and the United Arab Republic). No elected member of the Council is due to retire in 1960, and it will not be until the end of 1961 that the balance of parity on the Council can be restored. Since Burma, Paraguay and the U.A.R. are due to retire on 31 December 1961, parity on the Council can then be restored by not electing new members in lieu of these three States. This, of course, on the assumption that until 31 December 1961 no trust territory except western Samoa will have attained independence.[2]

While it is thus possible that by the end of 1961 parity on the Council will be restored, it is impossible to know how long it will last.[3] Unless new territories are placed under trusteeship, which is politically unlikely,[4] in the next few years the Organization may be faced with the entire disappearance of the elected category of members of the Trusteeship Council and with a permanent lack of parity on the Council. It is observed that if one of the permanent members of the Security Council now administering a trust territory in addition to one administering State which is not a permanent member of the Security Council, or three States of the latter category, cease to be administering States, the number of members of the Trusteeship Council by virtue of Article 86 (1) (*b*) will exceed the number of members of the Council by virtue of Article 86 (1) (*a*) and the principle of parity may become a relic of the past.

[1] G.A.O.R., Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 783.

[2] The attainment of independence by western Samoa will not affect the membership of the Council since New Zealand is also an administering State for the trust territory of Nauru. Regarding this, see also Bailey, loc. cit., above, p. 252, n. 2, p. 417; Toussaint, op. cit., above, p. 252, n. 2, pp. 168–9. The possible attainment of independence by British Cameroons would not affect the balance of membership of the Council, since the United Kingdom is also the administering authority for the trust territories of Tanganyika and Nauru.

[3] See also Bailey, loc. cit., above, p. 252, n. 2, pp. 417–18.

[4] See also ibid., pp. 419–20.

The Debate at the Fourteenth Session of the General Assembly

It is proposed to examine at this juncture the debate which took place at the Fourteenth Session of the General Assembly prior to the election of India and Bolivia to the Trusteeship Council. Obviously, had Item 17 of the agenda been considered by itself, no difficulties would have arisen. At the time of the elections, no Trust Territory had attained independence. But the General Assembly did concern itself with the bearing which events expected to occur during the year 1960 would have on the membership of the Council. On 27 April France was to cease to be an administering State, and would retain its seat on the Council by virtue of Article 86 (1) (*b*). On the assumption that the General Assembly was to elect two members of the Council, in accordance with Article 86 (1) (*c*) and Rules 149 and 150, for three-year terms, it follows that were parity on the Council to be maintained after 27 April, two non-administering States would have to relinquish their seats on the Council. Similarly, on 1 July upon the retirement of Italy from the Council, one more non-administering State would have to relinquish its seat on the Council. Otherwise parity would be disrupted.

Two draft resolutions dealing with this situation were presented to the General Assembly. The U.S.S.R. draft resolution[1] proposed that the Assembly elect two members and decide to resume on 28 April its Fourteenth Session 'with a view to taking a decision on the change in the composition' of the Council 'in connection with the reduction in the number of Members of the United Nations administering Trust Territories'. The Tunisian revised draft resolution[2] also proposed that the General Assembly elect two members to the Council, but it further proposed that on the above-mentioned dates, non-administering States in the numbers referred to in the immediately preceding paragraph 'cease to be' members of the Council, and that 'in the absence of voluntary resignations, the Trusteeship Council shall proceed, by drawing lots, on 27 April 1960 and 1 July 1960 respectively, to designate the elected countries which shall cease to be members of the Trusteeship Council'.

The U.S.S.R. maintained that its proposal was aimed at avoiding the violation of either the principle of parity or that of the election for three-year terms. Were the decision on the change in the composition of the Council postponed till the Fifteenth Session of the General Assembly, the

[1] A/L.274.

[2] A/L.275/Rev.1. This draft resolution contained, *inter alia*, the following paragraph: '*Considering* the desirability of studying the situation which would result both from the fact that it will soon be impossible to observe simultaneously the principles of parity and of the inclusion of the permanent members of the Security Council in the membership of the Trusteeship Council, and from the fact that the category of elected members whose role in the work of the Trusteeship Council has proved important will be eliminated in the very near future.'

Council 'would be functioning with a membership not in accordance with the United Nations Charter'.[1]

While no objections of a legal nature can be adduced against the proposal of the U.S.S.R. to resume the Fourteenth Session of the General Assembly, it is observed that legally nothing could be accomplished at the April session, or, for the same reason, at the Fifteenth Session of the General Assembly. The Charter does not authorize the General Assembly to change the composition of the Council between one election and the other. The only regulatory means by which the Assembly can change the membership of the Council are the triennial elections. On the other hand, were the changes in the membership contemplated by the U.S.S.R. to be of a voluntary character, no reconvening of the General Assembly would be necessary. The draft resolution was not adopted, having failed to obtain the required two-thirds majority. The result of the vote was 29 in favour, 26 against and 26 abstentions.[2]

Tunisia also claimed that its proposal would honour both the principle of parity and that of the election for three-year terms. In order to maintain parity on the Council, it proposed to impose upon the Council the duty to designate, by drawing lots, the elected States which should cease to be its members. It argued that this procedure 'obviates any conflict with the provision for a three-year term, because when we elect two new members of the Trusteeship Council . . . it will be for a three-year period'.[3] In any event, the three-year period was a less important principle than that of parity and the practice of the Organization indicated the possibility of elections for less than the prescribed periods.[4] Tunisia argued also that Rules 95 and 133 of the Assembly's Rules of Procedure provided for the drawing of lots in certain cases.[5]

It appears that the Tunisian draft resolution was in violation of the

[1] G.A.O.R., Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 759. This argument will be considered below.

[2] Ibid., p. 775. It is observed that a similar proposal of the U.S.S.R. (A/L.277), which aimed at the convening on 28 April 1960, in accordance with Rule 7, of a special session of the General Assembly was also rejected by the General Assembly by 32 votes to 26 with 20 abstentions. Ibid., p. 784.

[3] Ibid., p. 757.

[4] Tunisia referred, in this connexion, to the instances of voluntary resignation from the Council by elected members and compromise elections to the Security Council for less than two years. See also Robinson, loc. cit., above, p. 253, n. 2, p. 553.

[5] Rule 95 provides, *inter alia*, as follows: 'When only one person or Member is to be elected and no candidate obtains in the first ballot the majority required, a second ballot shall be taken which shall be restricted to the two candidates obtaining the largest number of votes. If in the second ballot the votes are equally divided and a majority is required, the President shall decide between the candidates by drawing lots. . . .'

Rule 133 provides: 'When only one person or member is to be elected and no candidate obtains in the first ballot the majority required, a second ballot shall be taken, which shall be restricted to the two candidates obtaining the largest number of votes. If in the second ballot the votes are equally divided, and a majority is required, the Chairman shall decide between the candidates by drawing lots.'

Charter. The functions of the General Assembly in regard to the elections of non-administering members to the Trusteeship Council are clearly defined in the Charter. In certain cases the Assembly must proceed to the election of such members in accordance with the conditions laid down in Article 86 (1) (*c*). The Assembly may not charge the Council with determining or modifying its own membership, and certainly not by imposing upon it the duty of drawing lots. Neither the Council nor any of its members would be bound to follow such an unconstitutional request, for the drawing of lots by members of the Council may be based upon consent only. The Rules of Procedure relied upon by Tunisia have no relevance to the compelling of an elected member to relinquish its seat before the expiration of the term of office for which it was elected. It is observed that in the practice of the Organization the procedure of drawing lots is resorted to *only* when the votes are equally divided.[1] Similarly, the instances of past practice of the Organization referred to by Tunisia were based upon the consent of the States concerned and are therefore not relevant to the problem under discussion. The Tunisian draft resolution would not only violate the three-year principle but would invoke a procedure which would be in clear violation of the Charter. It would amount, in effect, to an attempt to revise the Charter by an illegal procedure.

The Tunisian draft resolution was not adopted, having failed to obtain the required two-thirds majority. The result of the vote was 45 in favour, 28 against and 8 abstentions.[2]

In connexion with the Tunisian draft resolution it may be recalled, in the words of the International Court of Justice in the Advisory Opinion of 8 June 1960 concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, that not the 'discretion of the Assembly' but Article 86 of the Charter is 'the supreme rule for the constitution'[3] of the Trusteeship Council. The following statement made by the Court concerning the elections to the Maritime Safety Committee is relevant also to the functions of the General Assembly under Article 86 (1) (*c*) of the Charter:

> 'One of the functions of the Assembly is, in accordance with Article 16 (*d*) of the Convention, "to elect the Members . . . on the Maritime Safety Committee as provided in Article 28". The scope and character of this function of the Assembly are accordingly to be found in Article 28. This function can only be exercised under the conditions laid down in that Article.'[4]

By adopting neither the Soviet nor the Tunisian draft resolution, the

[1] See, e.g., Rule 95.
[2] G.A.O.R., Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 775.
[3] *I.C.J. Reports*, 1960, p. 150 at p. 160.
[4] Ibid., at p. 158.

General Assembly rejected the view[1] that the election designed to fill the vacancies which were to occur on 31 December 1959 must be accompanied by agreement concerning the procedure to be followed in order to preserve the principle of parity. Instead, the General Assembly proceeded to elect India and Bolivia as members of the Trusteeship Council for the period prescribed in Article 86 (1) (*c*). This considered and deliberate action of the General Assembly may indicate that in its view the composition of the Trusteeship Council would not, as was suggested by some States, be in violation of the provisions of the Charter.

In the discussions which took place in the General Assembly prior to the rejection of the Soviet and Tunisian draft resolutions, an inconclusive exchange of views took place concerning the relative importance of the principle of parity *vis-à-vis* that of election for three-year terms. Probably the majority of those representatives who participated in the discussion of this question thought that the principle of parity was politically more important than the maintenance of the three-year terms of office, to which they did not attach any particular significance. It is suggested that the determination of the more important principle of the two, is a matter for subjective judgment. Even if it could be maintained that the principle of parity is politically more important than that of three years, it would appear that those who adhered to this view have disregarded the consideration that the term of office of three years' duration may be required in order to enable the 'specially qualified person' representing his State on the Council to perform satisfactorily his duties. This raises also the broader question whether the General Assembly may deliberately disregard a clear and mandatory provision of the Charter in order to honour the worthy goal of parity. Would this not be tantamount to the rewriting of the Charter by the General Assembly? However, it was argued that the three-year term was not absolute and mandatory, for otherwise voluntary resignations from the Council would not have been allowed. With respect to this argument, it is suggested that it is one thing to allow voluntary resignations of members from the Council, in accordance with the general practice of the Organization allowing resignations from elected bodies and posts, while it is a different thing altogether to impose upon a State the duty to resign from the Council before the expiration of the term of office clearly and mandatorily prescribed by the Charter.

While some States contended that the Trusteeship Council, in which parity will not be maintained after 27 April 1960, will be illegally constituted, other States argued that the Council will be legally constituted and that both the principle of parity and that of the three-year term of office

[1] See, e.g., the statement of the representative of Haiti, G.A.O.R., Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 761.

will be honoured. The latter thesis was expressed, *inter alia*, by Sir Andrew Cohen in whose view the best interpretation of Article 86 is that according to which

'the membership of the Council is constituted at the moment of elections. When the terms of elected members expire, we must clearly proceed to elect sufficient members to balance the number of members who, at that moment of election, are administering Trust Territories . . . the membership of the Council should then, in our view, remain unchanged until the next occasion on which the term of office of elected members expires.'[1]

Similarly, Jha, the representative of India, argued that though a trusteeship agreement may be terminated on a particular date, the obligations of the administering authority *vis-à-vis* the General Assembly and the Trusteeship Council need not be terminated on that date. If the administering authority has not submitted the annual report in accordance with Article 88 of the Charter before it ceased to be an administering authority, it must do so thereafter. 'For the consideration of the reports, the presence of the Administering Authority in the Council is necessary and even obligatory.'[2] Since the final reports in respect of the trust territories of French Cameroons and Togoland, and Italian Somaliland will not be submitted by the administering authorities until some time after the attainment of independence by these trust territories, 'there will really be no stretching of the Charter if the countries concerned stay on in the Council until the next session of the General Assembly.'[3] Jha went on to say:

Article 86 comes into play at the time of the election. . . . It is arguable that, after the election has been made under Article 86, paragraph 1 (*c*), that section must be deemed to lie dormant until the time for the next election comes.

'Article 86, paragraph 1 (*c*) does not support the contention that the composition of the Council shall be changed during the three-year tenure of office whenever a Trusteeship Agreement is terminated and an Administering Authority ceases to be such. If that were the intention, Article 86, paragraph 1 (*c*), would not have laid down a mandatory three-year election period, and instead would have made specific provision for changes during the three-year period if certain events took place. The Charter could not have intended synchronization of the date of independence of Trust

[1] G.A.O.R. Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 770.

[2] Ibid., p. 766. It is no doubt true that the obligations of the administering authority *vis-à-vis* the Organization need not be terminated on the date of the attainment of independence. However, as experience with regard to the participation of Italy in the work of the Trusteeship Council prior to 14 December 1955 indicates, a way can be found to enable the participation in the work of the Council of the previously administering State with respect to the examination of annual reports submitted under Article 88 of the Charter which have not been considered before the attainment of independence. Such a participation would be without the right to vote. See the Supplementary Rules of Procedure relating to the Participation in the Sessions of the Trusteeship Council of Italy as the Administering Authority for the Trust Territory of Somaliland and of States Members of the Advisory Council for the Trust Territory of Somaliland which are not Members of the Trusteeship Council, *Rules of Procedure of the Trusteeship Council*, T/1/Rev.3.

[3] G.A.O.R. Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 766.

Territories with the date of elections under Article 86, paragraph 1 (*c*), and thus by implication discouraged the emergence into independence of Trust Territories on any intermediate dates.'[1]

If these suggestions mean that the membership of the Trusteeship Council is determined at the time of the triennial elections in respect to *all its members*, and that subsequent attainment of independence by trust territories does not immediately change the membership of the Council, it is submitted that they are only partly correct. It is true that the composition of the Council is determined at the time of the triennial elections with respect to the elected members. These members have the right, by virtue of their being elected for three years in accordance with the Charter, to retain their seats on the Council during that period, regardless of subsequent changes in the number of States administering trust territories. It does not, however, follow that it can be maintained that the administering members of the Council have the right to retain their seats on the Council till the next triennial elections take place or till the annual reports are examined, even though the territories which they administered have since attained independence. The status of the administering States as members of the Council has no connexion whatsoever with the election to the Council of non-administering States in accordance with Article 86 (1) (*c*). An administering State becomes a member of the Trusteeship Council *ipso facto* upon the approval of the Trusteeship Agreement by the General Assembly[2] or the Security Council[3] as the case may be. Its membership is terminated, also *ipso facto*, at the time of the final attainment of independence by the trust territory for which it was responsible. Anyhow, any doubts in this respect have been removed by the declaration of the representative of France that 'On 27 April 1960, France will no longer consider itself as an Administering Authority and will be a member of the Trusteeship Council in its capacity as a permanent member of the Security Council. It will therefore accept all the practical consequences of this new situation in its participation in the Council's work.'[4]

Conclusions

1. *Is the Trusteeship Council now legally constituted?*

It has already been observed that the view was expressed by some States at the Fourteenth Session of the General Assembly that the Trusteeship Council, in which, following the attainment of independence by several trust territories in the course of the year 1960, parity would no longer obtain, would not be legally constituted. It is submitted that this view is not sound.

[1] G.A.O.R. Fourteenth Session, 857th Plenary Meeting, 12 December 1959, p. 766.
[2] Article 85. [3] Article 83. [4] G.A.O.R., this page, n. 1, p. 771.

The examination of the text of Article 86 shows that by its very terms parity is a goal which cannot be attained in two sets of circumstances: either when a State ceases to be an administering authority before the expiration of the term of office of one (or more) of the elected members or, when the number of members of the Council under Article 86 (1) (*b*) exceeds that under Article 86 (1) (*a*).[1] At present we are faced with the first set of circumstances, and before long we may be faced with the second. Article 86 is deficient in so far as it does not make parity always possible. This, however, need not lead to the conclusion that the Council is now illegally constituted. In the first place, it should be observed that parity is not relevant to the membership of the Council under Article 86 (1) (*a*) and (*b*).[2] These provisions are mandatory and the two categories of States mentioned therein have been obligatorily designated[3] as members of the Council regardless of their relative numbers. The principle of parity is relevant only for the determination of the number of States to be elected for three-year terms when the number of the members of the Council under Article 86 (1) (*a*) exceeds those under Article 86 (1) (*b*). The provision regarding three-year terms of office is mandatory and imperative and the principle of parity, designed to operate at election-time only, cannot divest an elected member of membership in the Council even though one of the other members may have ceased to be an administering State and has relinquished its seat on the Council. The General Assembly has no discretion in this respect and it must elect non-administering States for three-year terms. The General Assembly acted in accordance with the clear mandate of the Charter in electing India and Bolivia for three-year terms.

[1] This was clearly stated by Kelsen: 'In case the number of members administering trust territories is less than the number of permanent members not administering trust territories the total number of members of the Trusteeship Council is not equally divided between those Members of the United Nations which administer trust territories and those which do not. The number of those which do not administer trust territories is greater than the number of those which do. Also in case a Member of the United Nations administering a trust territory loses its position as a member of the Trusteeship Council—for instance, because the trust territory which it administers attains complete independence—the number of the members of the Trusteeship Council not administering a trust territory is greater than that of the members administering trust territories, until the term of office of one elected member expires. If, for the reason just mentioned, a permanent member of the Security Council ceases to be a member of the Trusteeship Council under clause (*a*), but continues to be a member of this Council under clause (*b*), the number of the members not administering a trust territory surpasses even by two the number of the members administering trust territories. In case the number of the members administering trust territories increases during the three-year term of the elected members, additional election has to take place. Thus the number of members which do not administer a trust territory in spite of the provision of Article 86, paragraph 1, clause (*c*), may be greater . . . than the number of those which do'. Op. cit., above, p. 252, n. 1, pp. 662–3.

[2] In connexion with this it is recalled that Committee II/4 at San Francisco rejected the Egyptian amendment which aimed at parity on the membership of the Council between elected and non elected members.

[3] See also the Advisory Opinion of 8 June 1960 concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organizstion, I.C.J. Reports*, 1960, p. 150 at p. 159.

It is the deficiency of the Charter and not the necessary action of the General Assembly that has disturbed the parity, which is not likely to be restored *before* the next triennial elections.[1] In conclusion, since the principle of parity is relevant only at the time of the elections, the General Assembly acted properly and the Council is legally constituted.[2]

In addition to this textual interpretation of the Charter, the following considerations can be adduced in support of the legality of the Council as now constituted.

The practice of the Organization, which is an important element in the interpretation of the Charter, clearly indicates that a temporary lack of parity has never been considered as rendering the Council illegal. Whenever vacancies have occurred, the General Assembly has proceeded, in the course of its normal activities, to elect to the Council non-administering members. *Immediate* elections have not been considered necessary, or indeed ordinarily possible. A special session has never been called in order to fill any vacancies. The considered decision of the General Assembly in 1959 to elect two States for three-year terms deserves a particular attention. It is not to be assumed lightly that the General Assembly acted to establish an illegal Trusteeship Council.

The Trusteeship Council as now constituted is in fact not equally divided between administering and non-administering States. But the reason for this is not any improper action of the General Assembly but because the new circumstances do not make the simultaneous fulfilment of all the provisions of Article 86 possible. It would be undesirable to conclude, through a rigid adherence to all the provisions of an imperfect Article, that the Council is not legally constituted and thus to frustrate the objects of Chapters XII and XIII of the Charter. Article 86 must be interpreted in accordance with the major principle of interpretation of treaties—that of effectiveness. Such a possible interpretation has been suggested above: it has been submitted that parity is relevant only at the time of

[1] Such a temporary lack of parity had been possible, even before Committee IV/1 of the United Nations Conference on International Organization amended the proposal of the Working Paper so as to include in the membership of the Council all permanent members of the Security Council.

[2] A similar argument is made by Toussaint: 'A possible interpretation of the requirement of equality of representation on the Trusteeship Council is that it is applicable only to members of the Trusteeship Council who fall under paragraph 1 (*c*) of Article 86. . . . The requirement of equality of representation is relevant only when the question of electing *additional* members of the Trusteeship Council is under consideration; if the Trusteeship Council consists of only members holding seats under paragraphs 1 (*a*) and 1 (*b*), it is not contrary to Article 86 for the membership to be unequally divided between the two. . . . This interpretation of Article 86 would appear to be the only one consistent with the Charter provisions on trusteeship as a whole. If the equality of representation requirement were intended to restrict the representation on the Trusteeship Council of members referred to in paragraph 1 (*b*), then it should have been mentioned in this paragraph or in the preamble to Article 86 (1), as well as in paragraph 1 (*c*)'. Op. cit., above, p. 252, n. 2, pp. 164–5.

elections under Article 86 (1) (*c*). *Ut res magis valeat quam pereat.*[1] In several instances, the International Court of Justice has applied this principle to the interpretation of international instruments of a constitutional character.[2] It is particularly appropriate in this connexion to cite the following statement of the Court in its Advisory Opinion on the *International Status of South-West Africa*:

'The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized the International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates System. It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.'[3]

Supervision of trust territories is the heart of the international trusteeship system established by Chapter XII of the Charter. The principal organ entrusted with this task is the Trusteeship Council. While it is true that the principle of parity does not now obtain at the Trusteeship Council, it is a fact that, as presently constituted, the Council is perfectly capable of performing the same supervisory functions which it has performed since its establishment. If anything, the majority which the non-administering States now enjoy in the Council, constitutes a guarantee that the supervision will be a real one. The present composition of the Council may be politically unfair to the administering States which no longer control half of the voting power. It would therefore be desirable that, either through a political compromise which would bring about voluntary resignations of three non-administering States, or through the amendment of Article 86 in accordance with the provisions of Chapter XVIII of the Charter, which is unlikely in the present political climate, parity be restored. There is, however, no justification for the frustration of the international trusteeship system merely because of the impossibility of maintaining parity in the supervisory organ. There is no reason to assume that the Council, constituted as it is in accordance with the mandatory provisions of Article 86, is not legally constituted.

[1] See Lauterpacht, op. cit., above, p. 267, n. 1, pp. 227–30.

[2] Ibid., pp. 274–81.

[3] *I.C.J. Reports*, 1950, p. 128 at p. 136. Lauterpacht, commenting upon this Opinion, says that 'Seldom was there a more compelling occasion for applying—as the Court did in fact—the *cy-près* doctrine which common law courts apply in order to render effective a general charitable intention in face of the impossibility of applying it according to the literal language of its author.' Op. cit., p. 279.

2. *The Future of the Trusteeship Council*

While it may be possible to restore parity on the Council by not electing any States in lieu of the three States which are due to retire from the Council on 31 December 1961, it is clear that unless additional territories are placed under trusteeship, which is politically unlikely, the number of members of the Council under Article 86 (1) (*b*) will soon exceed the number under Article 86 (1) (*a*), and Article 86 (1) (*c*)—including the principle of parity—will no longer be operative. This will not be the only case of 'invalidation of . . . Articles of the Charter by . . . changing situations'.[1] While the political balance in the composition of the Council will thus be disrupted, the necessity for supervision will continue to exist despite the change in the membership of the supervisory organ,[2] which is clearly capable of performing its functions.

It was one thing to postpone the initial establishment of the Council pending the approval by the General Assembly of a sufficient number of trusteeship agreements to make parity possible. However, once the international trusteeship system has been established, the Organization cannot, just because of the change in the composition of the supervisory organ, escape the responsibilities which it has undertaken. The necessity for supervision continues to exist as long as there exists a single trust territory and only when all the trust territories have attained independence (which may be a remote occurrence) will the Council, having exhausted its functions, be dissolved.[3] The conclusion that the Council will be so dissolved[4] is clear although the Charter does not contain any provisions concerning its eventual dissolution. According to Article 86 the Council 'shall consist' of two categories of members obligatorily designated: members administering trust territories and permanent members of the Security Council. Upon the disappearance of the first of these two categories, the Council can no longer exist. The trusteeship system will no longer exist and the five permanent members of the Security Council, endowed with no functions or powers relating to the extinct system of trusteeship, will certainly not constitute 'The Trusteeship Council', which by then will have well performed its historical functions.

[1] Robinson, loc. cit., above, p. 253, n. 2, p. 555.

[2] See the Advisory Opinion of 11 July 1950 concerning the *International Status of South-West Africa, I.C.J. Reports*, 1950, p. 128 at p. 137.

[3] See also Toussaint, op. cit., above, p. 252, n. 2, p. 163: '. . . the Trusteeship Council is not authorised to cease operating whilst there are any trust territories left in existence, since its assistance is still required by the General Assembly in the exercise of the supervision over the remaining trust territories.'

[4] The Trusteeship Council was formally established by Resolution 64 (1). The question whether or not a Resolution of the General Assembly formally dissolving the Council will be required, is not being considered in this paper.

UNLAWFUL SEIZURE AND IRREGULAR EXTRADITION*,[1]

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A PERSON who has committed a crime in one State and has fled to another may be brought within the jurisdiction of the State where he committed the offence in a number of ways. He may be extradited in a regular manner. He may be surrendered as the result of irregular extradition proceedings; the irregularity may be merely a breach of the municipal law of one or both States, or it may be a breach of some provision of the relevant extradition treaty. Whether or not an extradition treaty exists between the two States an offender in one of the States may be recovered from the other as a result

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[1] See on this topic: Sir Edward Clarke, *Extradition* (4th ed., London, 1903), esp. pp. 116–18, 218–19; *Corpus Juris Secundum* (ed. by Kissen, New York, 1943), vol. 25, pp. 314–15; Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law', *American Journal of International Law*, 28 (1934), pp. 231–45; Gibbs, *Extradition Treaties* (London, 1868), pp. 13–24; Green, 'Recent Practice in the Law of Extradition', *Current Legal Problems*, 6 (1953), pp. 274–96, especially pp. 279–81; Hackworth, *Digest of International Law* (8 vols., Washington, 1940–4), vol. 2, 320–1, vol. 4, pp. 224–8; Harvard Research: 'Draft Convention on Jurisdiction with Respect to Crime', Article 16, Supplement to *American Journal of International Law*, 29 (1935), pp. 623–32; Hyde, 'Notes on the Extradition Treaties of the United States', *American Journal of International Law*, 8 (1914), pp. 487–514, esp. pp. 499–501; id., *International Law Chiefly as Applied and Interpreted by the United States* (2nd ed., 3 vols., Boston, 1947), vol. 2, pp. 1031–2; Jessup, *Transnational Law* (New Haven, 1956) pp. 60–62; Sir Hersch Lauterpacht, 'The Subjects of the Law of Nations', *Law Quarterly Review*, 63 (1947), pp. 438–60; 64 (1948), pp. 97–119 esp. pp. 100–1; Lewis, *On Foreign Jurisdiction and the Extradition of Criminals* (London, 1859); Lord McNair, 'Extradition and Extraterritorial Asylum', this *Year Book*, 28 (1951), pp. 172–203; Moore, *Treatise on Extradition and Inter-State Rendition* (2 vols., Boston, 1891), esp. vol. 1, pp. 281–302; id., *Digest of International Law* (8 vols., Washington, 1906), esp. vol. 2, pp. 333–6; vol. 4, pp. 328–32; Morgenstern, 'Jurisdiction in Seizures effected in Violation of International Law', this *Year Book*, 29 (1952), pp. 265–82; Oppenheim, *International Law*, vol. 1 (8th ed., by Sir Hersch Lauterpacht, London, 1955), esp. pp. 295–6, 703; Sir Francis Piggott, *Extradition* (London and Hong Kong, 1910), esp. pp. 9, 34–35, 90–92, 125–6; Preuss, 'Kidnapping Fugitives from Justice on Foreign Territory', *American Journal of International Law*, 29 (1935), pp. 502–7, 'Report from the Select Committee on Extradition, &c.', *Parl. Pap.* (1867–8, VII. 129), p. 70; Vincent, *Procedure d'Extradition* (London and Paris, 1881), p. 74.

For other references see Briggs, *Law of Nations* (2nd ed., London, 1953), p. 579 and the authorities cited there.

Lord McNair's *International Law Opinions* (3 vols., Cambridge, 1956) is of particular value. In addition to the material contained there, a valuable source for the opinions of the Law Officers of the Crown, &c., has been the Home Office Papers preserved in the Public Record Office, London. This material is herein referred to by the abbreviation *P.R.O.*, H.O., followed by the appropriate reference number. This unpublished Crown Copyright material is reproduced in this article by kind permission of the Controller of H.M. Stationery Office.

For the texts of treaties cited see *The Statutory Rules & Orders and Statutory Instruments, revised to December 31, 1948: (Excerpt from Volume IX)*: *Fugitive Criminal* (H.M.S.O., London, 1951), hereinafter referred to as *Fugitive Criminal.*

For an absorbing novel largely concerned with the problem of the jurisdiction of United States courts over persons apprehended illegally abroad, see Lipsky, *Lincoln McKeever* (London, 1954), also published under the title *Day of Judgment* (London, 1955).

of the violation of some rule of international law. Thus he may be seized on the territory of the asylum State by agents of the State which wishes to bring him to trial.[1] A very recent example of this was the seizure of Adolf Eichmann on Argentine territory by a party of Israelis who brought him back to Israel for trial on a charge of murdering six million Jews during the last war.[2] It is the purpose of this article to consider, particularly in the light of British practice, the legal position of a fugitive criminal recovered for trial as the result either of an unlawful seizure or of irregular extradition proceedings, and to contrast it with the position of one who was extradited in a wholly regular manner. Some attention will be given to the problem of the remedies available to individuals and to States for unlawful seizures and for irregularities in extradition proceedings. For convenience the discussion is divided under the following heads:

A. *Recovery of fugitive criminals in violation of international law.*
B. *Apprehension of a fugitive criminal in the territory of State B by private individuals, nationals of State A, with the connivance of the officials of State A.*
C. *Apprehension of a fugitive criminal in the territory of State B by private individuals, nationals of State A, without the connivance of the officials of State A.*
D. *Irregular apprehension of a fugitive criminal in State B by an official of State B prior to his extradition to State A.*
E. *Mistaken surrender of a fugitive criminal by one State to another.*

A. Recovery of Fugitive Criminals in Violation of International Law

(i) *Seizure in violation of Customary International Law*

It is a rule of international law that a State must not perform acts of sovereignty on the territory of another State.[3] Hence the arrest of a fugitive criminal by the officials of one State in the territory of another is prima facie a breach of international law.[4] But if the State of asylum acquiesces in the arrest, as when officials of that State participate in the irregular apprehension, there is no breach of international law.[5]

It has not infrequently been asserted that British courts will exercise

[1] Cf. Reid, 'Inter-State Rendition and the Illegal Return of Fugitives', *Howard Law Journal*, 2 (1956), pp. 76–93.

[2] See *The Times*, 25, 26 and 28 May 1960; 3, 7, 8, 9, 10, 11, 20, 21, 22, 23, 24, 25 and 27 June 1960; 4, 5, 7 and 8 July 1960; 4 August 1960. See also O'Brien 'The Right to Try Eichmann', *Daily Telegraph*, 10 June 1960, and Green, 'The Eichmann Case', *Modern Law Review*, 23 (1960), pp. 507–15 (hereinafter referred to as *Eichmann*).

[3] Oppenheim, op. cit., p. 295; Walker, *A Manual of Public International Law* (Cambridge, 1895), p. 50.

[4] Oppenheim, op. cit., pp. 295–6.

[5] Preuss, loc. cit., p. 507.

jurisdiction over persons brought before them in violation of customary international law.[1] The following are the cases which may be cited in support of this contention: *Ex parte Susannah Scott* (1829), *R.* v. *Sattler* (1858), *R.* v. *Nelson and Brand* (1867), *Sinclair* v. *H.M. Advocate* (1890), *In re Parisot* (1890), *R.* v. *Walton* (1905), *Emperor* v. *Vinayak Damodar Savarkar* (1910), and *R.* v. *O/C Depot Battalion R.A.S.C. Colchester, Ex parte Elliott* (1949). An examination of these cases, however, leads to the conclusion that in no one of them had a violation of customary international law actually occurred. While they contain dicta which might be regarded as supporting the above principle, in not one of these cases are such dicta necessarily part of the *ratio decidendi.*

It will be convenient to begin a survey of English practice in this matter by considering cases where arrests have been made abroad by British officials in the territory of a foreign State in which a fugitive criminal has sought refuge. A very early instance was the seizure in Antwerp in 1569 of Dr. John Story by British agents.[2] Story, who had the distinction of being the first Regius Professor of Civil Law at Oxford,[3] was a bitter persecutor of religious dissentients under Mary. During the reign of Elizabeth he was under suspicion for some time and eventually was arrested. He escaped and with the aid of the Spanish Ambassador in London reached asylum in Flanders. Here, under the Duke of Alva, he was given the task of searching all vessels that called at Antwerp for English goods, and in particular for heretical books. Believing that Story was engaged in plotting against Elizabeth, Cecil instructed some of his agents to abduct Story from Spanish territory. Story was induced to board a ship at Antwerp by the report of one of Cecil's agents that it carried a number of blasphemous books. As soon as Story came aboard the vessel set sail for England, where he was put on trial for treason.[4] He denied the jurisdiction of the English courts on the ground that he had become a Spanish national but made no attempt to oust their jurisdiction on the ground of the violation of Spanish sovereignty committed by Cecil's agents. The Spanish Ambassador did on two occasions demand Story's release[5] and the punishment of those who had been concerned in his abduction.[6] But

[1] *American Journal of International Law*, 29 (1935), Supp., p. 628.

[2] See Willis-Bund, *A Selection of Cases from the State Trials* (Cambridge, 1879), vol. 1, pp. 214–16; Walker, *A History of the Law of Nations* (Cambridge, 1899), vol. 1, p. 159, n. 1; *Calendar of State Papers, Spanish, 1558–1567*, pp. 322–4, 333; *Calendar of State Papers, Spanish, 1568–1579*, pp. 272–3, 276–7, 288, 296, 312, 322, 326–7; *Calendar of State Papers, Domestic, 1547–1580*, pp. 389–93, 395, 409, 411, 415. For a slightly different version of the affair, see *A Declaration of the Life and Death of John Story* (London, 1571), reprinted in *Lord Somers' Tracts* (2nd ed., by Walter Scott; 13 vols., London, 1809–15), vol. 1, pp. 477–87.

[3] *D.N.B.*

[4] *R.* v. *John Story* (1571), 1 *Howell's State Trials*, cols. 1087–96.

[5] *Calendar of State Papers, Spanish, 1568–1579*, p. 288; *Calendar of State Papers, Foreign, 1569–1571*, p. 457.

[6] Ibid., p. 431.

without result and Story was executed. This incident, as Holdsworth wrote,

'. . . is another illustration of the manner in which religious fanaticism produced irregularities in international practice. It is clear that his capture was a gross violation of the rights of the King of Spain.'[1]

The earliest British case in which the effect of the accused's irregular apprehension abroad upon the jurisdiction of the court to try him was considered was *Ex parte Susannah Scott* (1829).[2] Scott was arrested in Brussels by Ruthven, an English police officer, to whom the warrant for her arrest on a charge of perjury was specially directed.[3] Scott applied to the English Ambassador who refused to interfere, and she was brought in custody against her will to England where she was tried. On her behalf it was argued that the English court had no jurisdiction to try her because of the improper manner in which she had been brought within the jurisdiction. Delivering judgment against her, Lord Tenterden C.J. said:

'. . . The question therefore is this, whether, if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought and still continue to think that we cannot inquire into them. If the acts complained of were done against the law of a foreign country, that country might have vindicated its own law. If it gave her a right of action, she may sue upon it.'

It is uncertain from the facts whether or not the Belgian authorities agreed to the arrest. The arrest in itself was unlawful according to English law. It was probably unlawful under Belgian law. Lord Tenterden seems to have considered only illegality under municipal law. Nowhere in the judgment is the question considered of the effect of a breach of international as distinct from municipal law upon the jurisdiction of the court.[4] Cases cited in support of the proposition that the court could not inquire into the means by which the accused was brought within its jurisdiction were *R.* v. *Marks*[5] and *Ex parte Krans*.[6] Both these cases were concerned with the effect of a violation of English municipal law. Only one case was cited for the defence, namely, *Attorney-General* v. *Cass* (1822),[7] where the Court of

[1] Holdsworth, *A History of English Law* (London, 1924), vol. 5, p. 50.

[2] 9 B. and C. 446; 109 E.R. 166.

[3] It was not unusual for English police, in the shape of Bow Street Runners, to pursue and even to arrest fugitive criminals outside the United Kingdom during the latter half of the eighteenth and first half of the nineteenth centuries. Ruthven in particular had been abroad on several occasions for this purpose. See Goddard, *Memoirs of a Bow Street Runner* (Introduction by Pringle, London, 1956), p. 108.

[4] Cf. Morgenstern, loc. cit., p. 273: 'It is significant, however, that the learned Judge seems to have thought only in terms of a violation of Belgian law, not of international law.'

[5] 3 East 157; 102 E.R. 557.

[6] 1 B. and C. 258; 107 E.R. 96.

[7] 11 Price 345; 147 E.R. 494.

Exchequer did in fact inquire into the legality of the original arrest and held that a prisoner detained under legal process (a *capias* on an information for offences against the revenue laws), issued whilst the defendant was in custody as the result of an arrest made in violation of English municipal law, must be discharged. Baron Graham delivering judgment said:

'... The question really seems to be whether we shall permit a man, illegally arrested, to be detained under a legal Process issued during his detention. It is clear that the Defendant was originally illegally detained, because his first apprehension was not followed up as it ought to have been by carrying him immediately before a magistrate. It would be very dangerous to allow the Process of the Court to be so grossly abused.'

Baron Garrow said:

'... If we could entertain any doubt upon this application as to the course which we ought to pursue, it would be a reason for our discharging the party. This sort of proceeding, even if practised without concerted management, might, if not checked, lead to very dangerous consequences, encouraging Officers to consider themselves entitled to detain individuals during their pleasure, under pretence of obtaining instructions from their Board. I say this advisedly. In this case the Court are called on to protect the liberty, not indeed of the subject, but of those whom it is for the interest of the country to treat with favour—foreigners resorting here for the fair purposes of commerce.'[1]

The Court, *per* Lord Tenterden C.J., distinguished *Attorney-General* v. *Cass* from *Scott's* case:

'That was the case of an information for penalties, and rather in the nature of a civil proceeding to recover a debt than a criminal one to punish an offence against the public.'

Attorney-General v. *Cass* does not stand alone. In two other cases where prisoners while in custody under an unlawful arrest had been charged with a *capias* on an information for smuggling[2] the Court of Exchequer ordered their unconditional discharge. While one may recognize between offences against the revenue laws and ordinary criminal offences a distinction which might justify a different approach by the courts to the problem of the original, unlawful arrest, at the same time it must be pointed out that in *Ex parte Scott* the precise nature of the unlawfulness of the arrest was not discussed, in particular whether it was unlawful under English law, Belgian law or international law. In *R.* v. *Marks*[3] and *Ex parte Krans*[4] the arrest was unlawful according to English law, and this was held to be immaterial.

In *R.* v. *Sattler* (1858)[5] the accused having committed a felony in England, fled to Hamburg where, with the assistance of the Hamburg police,

[1] Contrast the very different approach of the court in *R.* v. *Weil* (1882), L.R. 9 Q.B.D. 701.
[2] *Attorney-General* v. *Dorkings* (1822), 11 Price 157, 147 E.R. 433; *Attorney-General* v. *Golder* (1823), 12 Price 335, 147 E.R. 739.
[3] 3 East 157, 102 E.R. 557.
[4] 1 B. and C. 258, 107 E.R. 96.
[5] D. and B. 539, 169 E.R. 1111.

he was arrested by an English detective, although the latter had no warrant and there was no extradition treaty in force between Hamburg and the United Kingdom. During the voyage back to England, Sattler shot the detective, who subsequently died. The problem submitted to the Court of Crown Cases Reserved was whether there was any jurisdiction to try Sattler for murder at the Old Bailey sessions. It was held that the statute 18 and 19 Vict., c. 91, which provided that offences committed by foreigners in British vessels on the high seas may be tried by any court within whose jurisdiction the offender is found, governed the case. The Court did not have to decide whether the original arrest was lawful. Lord Campbell C.J. said:

'. . . we are asked whether the prisoner was in lawful custody? It is quite unnecessary to answer that question, because he did not commit the offence with a view to his liberation; it is immaterial whether he was in lawful custody or not—he was guilty of murder and the offence was the same even if the custody was illegal.'[1]

Cockburn C.J. said:

'It is not to be assumed that the capture was illegal. We do not know what the law of Hamburg is; and, although there was here no extradition treaty, there may, by the law of Hamburg, be a power of extradition without treaty.'[2]

In this case the only obvious illegality committed was against English municipal law in that the detective had no authority to make the arrest. The fact that the arrest was made with the assistance of the Hamburg police is prima facie evidence that no breach of international law was committed. Further the question at issue was not whether an English court had jurisdiction to try Sattler for the original felony, but for a crime subsequent to his arrest.

In the light of these considerations it is perhaps surprising to find *R.* v. *Sattler* and *Ex parte Scott* cited by the U.S. Supreme Court in the following terms:[3]

'. . . There are authorities of the highest respectability which hold that such forcible abduction[4] is no sufficient reason why that party should not answer when brought within the jurisdiction of the court which has the right to try him for an offence, and presents no valid objection to his trial in such court.'[5]

The forcible abduction referred to in this quotation appears to have been an abduction in violation of international law.[6]

[1] 169 E.R. 1111 at 1114. Cf. *R.* v. *Anderson* (1868), 1 L.R., C.C.R. 161 at 162, *per* Blackburn J.: '. . . Sattler's case decides that even if wrongly brought here, it makes no difference'. See also *R.* v. *Carr* (1882), 10 Q.B.D. 76.

[2] 169 E.R. 1111 at 1113.

[3] They were also cited in *Mahon* v. *Justice* (1888), 127 U.S. 700; 32 L. ed. 283.

[4] i.e. abduction by a United States official of a criminal from the territory of Peru.

[5] *Per* Miller J. delivering the judgment of the Court in *Ker* v. *Illinois* (1886), 119 U.S. 436; 30 L. ed. 421 at 424.

[6] Whether the abduction in *Ker* v. *Illinois* was in violation of international law has been doubted; see Morgenstern, loc. cit., p. 269. It seems there may in fact have been no abduction at all; see Fairman, '*Ker* v. *Illinois* Revisited', *American Journal of International Law*, 47 (1953), pp. 678–86. However, the Court approached the matter as though there had been an abduction.

In *R.* v. *Nelson and Brand* (1867) the Lord Chief Justice, Sir Alexander Cockburn, let fall a dictum of some interest. Two members of a court martial in Jamaica which had arbitrarily sentenced a man to death were subsequently put on trial for murder and the Chief Justice was called on to consider the jurisdiction of a court martial when the person tried had been brought within its jurisdiction in violation of municipal law. This being the context, the Chief Justice said:

'. . . Suppose a man to commit a crime in this country, say murder, and that before he can be apprehended he escapes into some country with which we have not got an extradition treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English police officer were to pursue the malefactor, and finding him in some place where he could lay his hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him before a magistrate, the magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said, "Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him".'[1]

In *Re Parisot* (1890) a question was raised as to the validity of a warrant issued by a Bow Street magistrate for the arrest of a man in Jersey when the Jersey magistrates were, it was argued, the proper persons to issue such a warrant. Baron Huddleston in the course of discussion referred to an earlier case:

'. . . in which he was concerned many years ago, in which the well known officers, the Forresters,[2] had illegally arrested criminals in Brussels without any extradition treaty, and they were tried at the Old Bailey, before Mr. Justice Maule, and they were loud in their complaints of the illegality of their custody. But the Judge said, "No doubt you may have a good action of trespass, and after the end of your twenty years' transportation, to which I propose to sentence you, you may have your action".'[3]

In *R.* v. *Walton* (1905) the appellant, charged with a criminal offence in Canada, was arrested in the United States by a U.S. policeman who handed him over without the ordinary extradition formalities to a Canadian policeman present in U.S. territory. The appellant pleaded that his return to Canada had been accomplished in an illegal manner, and that therefore the Canadian courts had no jurisdiction. For the Crown it was alleged that his return had been voluntary. In the course of his judgment dismissing the appeal Osler J.A. said:

'We do not see any sufficient ground that has been made out to entitle the prisoner to his discharge. The prisoner was before the police magistrate upon a preliminary

[1] *Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the Case of the Queen against Nelson and Brand* (ed. by Cockburn, London, 1867), pp. 118–19.

[2] John and Daniel Forrester ran 'a semi-official private detective agency' in the City of London. See Goddard, op. cit., pp. xxv–xxvii.

[3] 5 T.L.R. 344. The report indicates that Maule J.'s macabre wit caused a laugh in court.

investigation. There were no extradition proceedings and we cannot inquire into the circumstances under which he was brought into this country. Mr. Mackenzie conceded that the only authorities he could find were against him on this point: *R.* v. *Lopez*,[1] *Ex parte Scott*,[2] *Ker* v. *Illinois*,[3] *R.* v. *Whiteside*.[4] Those cases or some of them show that the remedy for the illegal arrest and kidnapping of the prisoner is by proceedings at the instance of the government of the foreign country whose laws have been violated, or at the suit of the party injured against the trespasser. If he is found in this country charged with an offence against its laws it is the duty of our courts to take care that he should be amenable to justice.'[5]

The exact nature of the illegality is not clear from the judgment; the role of the United States policeman suggests that there was no breach of international law. At any rate such a breach was not specifically pleaded on behalf of the appellant.

In *Emperor* v. *Vinayak Damodar Savarkar* (1910) it was argued on behalf of Savarkar that he had been illegally removed from France, and that therefore the Indian courts had no jurisdiction over him. Although it was subsequently decided by the Permanent Court of Arbitration that Savarkar had not in fact been illegally removed from France,[6] for the purpose of argument the Indian Court assumed the validity of Savarkar's contention that there had been a violation of international law. Following Cockburn L.C.J.'s charge in *R.* v. *Nelson and Brand* and *Ex parte Scott*, Sir Basil Scott C.J. on behalf of the Special Tribunal hearing the case against Savarkar held:

'Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country.'[7]

The judgment in this case did not go into the question whether there are any grounds for assuming that an arrest in violation of international law should be treated in the same way as an arrest in violation of municipal law.

In *R.* v. *Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliott* (1949)[8] a deserter was arrested in Belgium by British Military Police accompanied by two Belgian policemen. At his trial he contended that his arrest was illegal because the British authorities had no authority

[1] D. and B. 523; 169 E.R. 1105. *R.* v. *Lopez* shared a common judgment with *R.* v. *Sattler*, D. and B. 539; 169 E.R. 1111.

[2] 9 B. and C. 446; 109 E.R. 166.

[3] (1886), 119 U.S. 436; 30 L. ed. 421.

[4] 8 Can. Cr. Cas. 478 (the only breach here was of municipal law).

[5] 10 Can. Cr. Cas. 269 at 275.

[6] *Savarkar* case (1911), in Scott, *Hague Court Reports* (New York, 1916), pp. 275–83. For the facts see below.

[7] I.L.R. 35 Bombay 225 at 228. See also *Re Stallmann* (1911), I.L.R. 39 Calc. 164 at 205. It may be noted that Savarkar had been a law student, although the Benchers of Gray's Inn had declined to call him to the Bar. See *The Times*, 2 May 1910. It seems to have been on Savarkar's own initiative that the point with regard to an arrest in violation of international law was raised.

[8] [1949] 1 All E.R. 373. See also *The Times*, 22 and 23 December 1948, 12, 19 and 20 January 1949.

to arrest him in Belgium and because he was arrested contrary to Belgian law. Lord Goddard C.J. delivering the judgment of the Court said:

'The point with regard to the arrest in Belgium is entirely false. If a person is arrested abroad and he is brought before a court in this country charged with an offence which the court has jurisdiction to hear, it is no answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the State of A or the State of B where I was actually arrested". He is in custody before the court which has jurisdiction to try him. What is it suggested the court can do? The Court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case. If he has been arrested in a foreign country and detained improperly from the time he was first arrested until the time he lands in this country, he may have a remedy against the persons who arrested and detained him, but that does not enable him to be discharged, though it may influence the court if they think there was something irregular or improper in the arrest. Once he is before the court it cannot hold him to bail until his trial and conviction. The point has been dealt with in these courts before. . . .'[1]

Lord Goddard then referred to *Ex parte Scott* and *Sinclair* v. *H.M. Advocate* (1890).[2] The latter case, as we shall see, clearly did not involve any breach of international law.

The only case which lends support to the view that an English court might decline jurisdiction where a criminal brought before it had been seized in violation of international law is *R.* v. *Garrett* (1917).[3] Four Russian subjects were charged with making false statements to the Russian consul in London for the purpose of obtaining passports. With the passports they obtained ostensibly for the purpose of returning to Russia, where they would have been liable to military service, they in fact went to Norway where they embarked upon a Danish ship for the United States. The ship was, however, intercepted on the high seas by the Royal Navy and brought to a British port to be searched for contraband under an agreement made with Denmark in order to avoid the dangers and inconvenience of such a search being conducted on the high seas. While the ship was in port the British police arrested the four Russians. Neither Denmark nor Russia protested against this action. An application for habeas corpus was made by the Russians on the ground that they had been forcibly removed from a neutral vessel on the high seas in breach of the comity of nations, and that they had been brought to Britain as the result of an illegal act. The Court refused to treat the applicants as though they had in fact been arrested on the high seas, and held that as they had been arrested in a British port the sovereignty of another State had not been violated. Viscount Reading C.J.,

[1] [1949] 1 All E.R. 373 at 376.

[2] 17 R. (J.C.) 38. For facts see below.

[3] 86 L.J. (K.B.) 894. See also *R.* v. *Garrett. Ex parte Sharf* (1917), 2 K.B. 99. For the background to this case see *The Case of the Russian Jews: Report of Proceedings at Bow Street and in the High Court* (published by the Foreign Jews Protection Committee against Deportation and Compulsion, London, 1917). A copy of this rare pamphlet can be found in the London Library.

however, indicated that had the arrest taken place in circumstances which would constitute a violation of international law, the result might have been different and the applicants released. If the arrest had taken place on the high seas Lord Reading said:

'. . . I would content myself with saying that a question would have arisen which would necessitate careful consideration by this Court as to whether a person could be properly arrested and charged with a municipal offence when arrested on the high seas on a neutral vessel detained for the purpose of search for contraband, and with no right whatever for an officer of the Navy or other persons to arrest those persons on the high seas. But it does not arise and I say no more about it.'[1]

At the conclusion of his judgment he reverted to the problem:

'. . . I do not for a moment say that no individual could ever raise such a question, and that it could only be raised through diplomatic channels or by complaints on behalf of either of the other States.'[2]

Coleridge J. added:

'The men were arrested, not in violation of the law of any other country, as the foreign or neutral vessel was in a British port by agreement. No complaint was made by the neutral State or any other State concerned. These being the facts, the case of *Scott, ex parte* (9 B. and C. 446) which has been alluded to, applies.'[3]

It would seem that Coleridge J. took the view that there was no violation of international law in *Ex parte Scott*.

The answer therefore to the question whether a British court will exercise jurisdiction over a person brought before it in violation of international law is less certain than is usually believed. In not one of the cases we have considered, was there an actual violation of international law. Most of them are authority for the principle that an arrest made in breach of English municipal law or in breach of the law of the State where the arrest took place (and this may or may not in addition be a breach of international law) is no bar to the jurisdiction of an English court. In only two of the cases, *Emperor* v. *Vinayak Damodar Savarkar* and *R.* v. *Garrett*, did the courts concerned expressly consider the effect of a breach of international law. The Indian Court contented itself with assimilating the effect of a breach of international law to that of a breach of municipal law. Its authorities for this were *Ex parte Scott*, and a dictum in Sir Alexander Cockburn's charge in *R.* v. *Nelson and Brand*, which appears merely to be a restatement of the principle of *Ex parte Scott*, and does not refer to a breach of international law as distinguished from municipal law. In

[1] 86 L.J. (K.B.) 894 at 898. Viscount Reading's approach to this case is very similar to that which he adopted in *Porter* v. *Freudenburg*, [1915] 1 K.B. 857, where he was prepared to consider enforcing Article 23 (*h*) of The Hague Convention, No. IV of 1907, although the Convention had never received express legislative enactment as part of English municipal law (at 874 and 878).

[2] 86 L.J. (K.B.) 894 at 900.

[3] 89 L.J. (K.B.) 894 at 900.

contrast is *R.* v. *Garrett* where, although *Ex parte Scott* was cited, Lord Reading C.J. indicated that a breach of international law might differ from a breach of municipal law in its effect upon the jurisdiction of the Court.

Westlake, it should be added, held the view, for which he cited no authority, that a person unlawfully seized abroad by agents of the British Government could plead his unlawful arrest as a bar to his prosecution in England.[1]

What are the remedies open to a fugitive criminal seized abroad by British officials in violation of the territorial sovereignty of another State? As we have seen it is less certain than is usually believed that the British courts will exercise jurisdiction. Apart from this it has been repeatedly suggested that the prisoner will have an action in tort against those guilty of his unlawful arrest and detention.[2] This was certainly not true in every case before 1948 if he had been convicted. The Forfeiture Act, 1870,[3] provided that no action at law or suit in equity could be brought by any convict during the period of his imprisonment. 'Convict' was defined by section 6 of the Act as 'any person against whom . . . judgment of death or penal servitude shall have been pronounced or recorded by any court of competent jurisdiction . . . upon any charge of treason or felony'. However, since 1948 persons undergoing imprisonment can sue.[4] In practice of course a prisoner will need to obtain the permission of the Prison Commissioners before initiating any action.[5] Furthermore, before 1948 it should be noted that imprisonment would not have prevented the Statutes of Limitation from running against a convict temporarily denied the right to sue.

Where could the injured person take proceedings? If the British official was still in the foreign country proceedings might be instituted in the courts of that country. In 1869 two English warrants charging one Joseph Lamb with embezzlement and fraudulent bankruptcy were presented to the British Vice-Consul at Rotterdam, who thereupon induced the Dutch police to arrest Lamb. Lamb was shortly afterwards released as, in the absence of an extradition treaty, the Dutch authorities had no power to surrender him for trial in England. He then brought a civil action against the Vice-Consul in the Dutch courts for having secured his unlawful

[1] *Annuaire de l'Institut de Droit International, Session de Hambourge*, 11 (1889–92), pp. 212–13. Cf. Morgenstern, loc. cit., p. 265.

[2] E.g. *per* Lord Tenterden C.J. in *Ex parte Scott*, 109 E.R. 166 at 176; *per* Sir Alexander Cockburn C.J. in *R.* v. *Nelson and Brand* (1867), above; *per* Huddleston B. in *Re Parisot* (1890), 5 T.L.R. 344; *per* Lord Goddard C.J. in *R.* v. *O/C Depot Battalion R.A.S.C., Ex parte Elliott*, [1949] 1 All E.R. 373, at 376.

[3] 33 & 34 Vict. c. 23, s. 8.

[4] Criminal Justice Act, 1948 (11 & 12 Geo. VI, c. 58), ss. 70, 78, 83, sch. 8, para. 8, sch. 10, Part I.

[5] *Salmond on the Law of Torts* (12th ed. by Heuston, London, 1957), p. 83, n. 33, and Street, *The Law of Torts* (2nd ed., London, 1959), p. 494.

arrest.[1] However, if the British official is no longer physically present in the State where the unlawful arrest took place it may not be possible to bring an action there.

Could an English court grant a remedy? If a wrongful act has been committed in a foreign country the question whether an English court would have jurisdiction to grant a remedy in tort would depend on the 'rule in *Phillips* v. *Eyre*'.[2] The first branch of the rule states that 'the wrong must be of such a character that it would have been actionable in England'. If the arrest has been made by a British policeman, the general rule is that a British constable has no authority to execute a warrant outside the area for which he is appointed.[3] If, however, the warrant is specially directed to him he may execute it anywhere within England and Wales.[4] He has no jurisdiction outside England and Wales, even if he is sent abroad for the express purpose of securing the extradition of a fugitive criminal.[5] A Home Office Circular of 25 October 1884 provides that:

'An officer sent abroad in an extradition case must confine his action strictly to tracing the fugitive and furnishing the foreign police with information. Under no circumstances may he himself attempt to arrest the fugitive, interfere with his liberty in a foreign country, or endeavour by threats or undue influence to induce him to return to England without the formalities of extradition. If a fugitive whose extradition has been demanded should voluntarily consent to return with the officer without formal extradition, the concurrence of the authorities of the foreign country must be obtained before this course is taken.'[6]

The second branch of the 'rule in *Phillips* v. *Eyre*' states that 'the act must not have been justifiable by the law of the place where it was done'. It might be conceivable that an arrest by a British policeman of a British subject would be justifiable by the laws of some countries in so far as such laws might not regard such an act as cognizable by their courts. This is unlikely.[7] It seems possible, therefore, that a British subject unlawfully seized abroad by a British policeman could successfully bring an action for false imprisonment and assault in a British court. However, if the person unlawfully seized abroad is an alien, and the British Crown adopts or authorizes his unlawful seizure, he would successfully be met by the defence of 'act of State' in a British court.[8]

[1] *P.R.O.*, H. O. 45/O.S. 8416. The Home Office Records do not indicate whether Lamb's action was successful.

[2] (1870), L.R. 6 Q.B. 1 at 28.

[3] *R.* v. *Chandler* (1700), 1 Ld. Raym. 545; 91 E.R. 1264; *R.* v. *Weir* (1823), 1 B. and C. 288; 107 E.R. 108; *R.* v. *Cumpton* (1880), 5 Q.B.D. 341.

[4] *R.* v. *Chandler* (1700), 1 Ld. Raym. 545.

[5] Moriarty and Williams, *Police Law* (15th ed., London, 1959), p. 49; id., *Police Procedure and Administration* (6th ed., 1955), pp. 34–37, 159. See also Constables Protection Act, 1750 (24 Geo. II, c. 44).

[6] This circular may be found in Kirchner, *Index to the Police Forces of the British Empire, &c., to which has been added a treatise on Fugitive Offenders and Extradition, &c.* (Manchester, 1893), p. 137.

[7] Cf. *McMillan* v. *Canadian Northern Railway Co.*, [1923] A.C. 120.

[8] Cf. the argument of Joyce's counsel in *Joyce* v. *D.P.P.*, [1946] A.C. 347 at 353.

The persons responsible for the unlawful seizure abroad may also be convicted of the crime of false imprisonment if they detain the fugitive in custody on a British ship.[1] The State of asylum might also invoke the extradition treaty between the two countries and request their surrender. Most British treaties include kidnapping amongst the crimes for which extradition may be granted; the Anglo-French Treaty of 1876 for instance mentions abduction (of minors), kidnapping and false imprisonment.[2] A provision in the Treaty of 1893 with Romania is of particular interest. Article II, section 21 of the Treaty included kidnapping and false imprisonment,[3] but by a Protocol of 13 March 1894 further explaining section 21 it was provided:

'The fact of having kidnapped or falsely imprisoned one or more persons will not admit of a requisition for extradition being made unless the act shall have been committed by private individuals. No such requisition can be made as against public functionaries who have been guilty of the act in question while in the performance of their duties.'[4]

This Protocol would raise some nice problems of interpretation if it were ever invoked. In several United States cases kidnappers have been extradited although jurisdiction was also exercised over the fugitive criminals brought within the jurisdiction of the United States by the kidnappers.[5] In 1618 a Dutchman who, acting on his own authority, had kidnapped a royal messenger in Scotland and carried him off to the United Provinces was surrendered, in the absence of a treaty, for trial in England. He made his submission before the Privy Council and was discharged.[6]

Another point which arises today is whether a person arrested in violation of international law would be entitled to petition the European Commission of Human Rights?[7] This would only be possible, however, where the State against which the complaint is lodged had made a declaration recognizing the competence of the Commission to receive such petitions, and the United Kingdom had made no such declaration.[8] Nevertheless, it should be noted that the Lord Chancellor, Lord Kilmuir, on 18 November 1958, explaining the attitude of Her Majesty's Government to the European Convention of Human Rights, said:

'. . . We are quite certain that our law does guarantee for our citizens the rights and freedoms that are contained in the Convention.'[9]

[1] *R.* v. *Lesley* (1860), Bell Cr. Cas. 220; 29 L.J., M.C. 97; 169 E.R. 1236.
[2] *Fugitive Criminal*, p. 134. [3] Ibid., p. 342. [4] Ibid., p. 348.
[5] E.g. *Villareal* v. *Hammond*, *Annual Digest*, *1933–1934*, Case No. 143, and *Vaccaro* v. *Collier*, *Annual Digest*, *1929–30*, Case No. 180.
[6] Lord McNair, *International Law Opinions*, vol. 2, p. 42; *Acts of the Privy Council of England*, *1616–1617*, p. 323; *Acts of the Privy Council of England*, *1617–1619*, pp. 115 and 127.
[7] See *Convention for the Protection of Human Rights and Fundamental Freedoms* (H.M.S.O. 1950, Cmd. 8130).
[8] *Parliamentary Debates* (*Hansard*), 5th Series, House of Lords, vol. 212, cols. 624–5.
[9] Ibid., cols. 622–3.

But is this really a correct statement of the legal position? Article 5 (1) of the Convention states:

'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

'(*a*) the lawful detention of a person after conviction by a competent court; . . .'

It may be questioned whether the trial and conviction of a person unlawfully seized abroad can be regarded as depriving a person of his liberty 'in accordance with a procedure prescribed by law'; and there is also the question as to what is meant by a 'competent court'? Does it mean competent according to the municipal law of the country concerned, or competent under international law? It cannot mean competent solely according to municipal law; otherwise, once a municipal court had, in accordance with its own municipal system, declared itself competent, this decision would not be open to review by an international tribunal. It must mean, therefore, competent in the light of international law. But it would seem that a court has no competence to exercise jurisdiction in violation of international law. Professor Preuss has written:

'Professor Dickinson has argued[1] forcibly that there is a total lack of national, and hence of judicial competence, in cases of seizure or arrest in violation of international law. This view is accepted in the present note, with the reservation that the question as to whether the courts or the executive shall give effect to the international obligation is purely a matter for national regulation.'[3]

Professor Preuss's reservation does not seem to be helpful in a case such as this where the competence of the municipal courts is expressly limited by international law.

Article 5 (5) of the Convention states:

'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'[3]

Against whom in English law is this right to compensation enforceable? Not against the Crown, for section 1 (5) of the Crown Proceedings Act, 1947,[4] provides:

'No proceeding shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person who discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of the judicial process.'

If the action is enforceable against members of the court exercising jurisdiction when it is not competent according to international law, this

[1] Dickinson, loc. cit. [2] Preuss, loc. cit., p. 505.

[3] Cf. Article 9 (5) of the 'U.N. Draft Covenant on Civil and Political Rights', reprinted in Green, *The United Nations and Human Rights* (Washington, 1956), p. 181.

[4] 10 and 11 Geo. VI, c. 44.

would be a constitutional innovation.[1] In addition to a petition against the State whose agents have violated international law in seizing him, a fugitive may also be entitled to lodge a petition against the State upon whose territory the unlawful arrest was made. This is because Article I of the European Convention provides that the High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention, including the right to be deprived of liberty only in accordance with a procedure prescribed by law.

The Convention does not provide any machinery on the international plane other than petition for the enforcement by an individual of the rights guaranteed to him therein. There is, however, an obligation on the High Contracting Parties to provide such machinery in their municipal legal systems.[2] There appears to be no such machinery available under British municipal law.

The remedies open to a person who has been arrested in violation of international law would seem to be very tenuous. However, he may be able to prevail upon the State whose territorial sovereignty has been violated to enter a diplomatic protest. He may be able to secure a complaint, addressed to the Commission by one of the High Contracting Parties, that a breach of the Convention has been committed.[3] The asylum State may itself take the initiative. What other remedies are open to a State on whose territory a seizure in violation of international law has occurred? Professor Preuss sums up the situation by stating:

'. . . Such a violation of foreign territory undoubtedly engages the responsibility of the State of arrest, which is under a clear duty to restore the prisoner and to punish or extradite the offending officers.'[4]

The comment on Article 16 of the Harvard Research Draft Convention on Jurisdiction with Respect to Crime stated the position as follows:

'It is everywhere agreed, of course, that "resort to measures in violation of international law or international convention" in obtaining custody of a person charged with crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured state, or otherwise. . . .'[5]

British practice is in accordance with the principle that in case of apprehension in violation of international law there is an obligation upon the arresting State to restore the person arrested. Thus when in 1807 the British ship

[1] Cf. *Anderson* v. *Gorrie* (1895), 1 Q.B. 668.

[2] Cf. Article 13 of the European Convention: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' Would damages alone be a sufficiently 'effective remedy', or must any conviction where jurisdiction has been obtained in violation of international law be also quashed?

[3] Cf. Article 24 of the European Convention.

[4] Preuss, loc. cit., p. 505.

[5] *American Journal of International Law*, 29 (1935), Supp., p. 623.

Leopard attacked an American frigate, the *Chesapeake*, in order to search for and arrest deserters from the Royal Navy, the British Government eventually agreed to take disciplinary measures against the captain of the *Leopard*, to pay money compensation to those injured in the brief encounter, and to restore to the United States the men removed from the *Chesapeake*.[1]

A somewhat similar incident occurred in 1861 when the United States Federal Navy removed from the Royal Mail-Packet *Trent* on the high seas two commissioners from the Confederate States of America and their secretaries, who were on their way to Europe. Earl Russell wrote to Lord Lyons, the British ambassador in Washington on 30 November 1861:

'It thus appears that certain individuals have been taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law. . . .

'Her Majesty's Government, therefore, trust that when this matter shall have been brought under the consideration of the Government of the United States, that Government will, of its own accord, offer to the British Government such redress as alone would satisfy the British nation, namely, the liberation of the four gentlemen, and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed.'[2]

While the two Governments differed about the particular nature of the illegality committed under international law, it was agreed that in the circumstances the seizure could not be justified, and the Confederate agents were liberated as requested.

In 1841 the British Government ordered the return to the United States of one Grogan who had been seized by British soldiers on U.S. soil and carried off to Canada.[3] In 1860 the Law Officers advised the surrender of

[1] The British claim in the early nineteenth century to search American ships for deserters and to impress British nationals serving on American ships was a contributory factor to the Anglo-American war of 1812. It also had the result that the treaty signed between the two countries on 31 December 1806 for the extradition of criminals never came into force. See *Parliamentary Debates*, vol. 9 (1807), cols. 570–85, 926, 929–30, 1183–5; vol. 10 (1808), cols. 311–14, 431–4, 553–601, 927–8; *Papers Presented to the House of Commons by Mr. Secretary Canning relating to America* (*Parl. Pap.* (1809), vol. 9, col. 449); *Papers Presented to the House of Commons, relating to the Encounter between His Majesty's Ship Leopard, and the American Frigate Chesapeake* (*Parl. Pap.* (1809), vol. 9, p. 455); *The Pamphleteer* (London, 1813), vol. 1, pp. 487–538; vol. 2, pp. 249–77; Burt, *The United States, Great Britain and British North America from the Revolution to the Establishment of Peace after the War of 1812* (New Haven, 1940), pp. 211–14, 241–5, 290–2, 296–7, 348; Updyke, *The Diplomacy of the War of 1812* (Baltimore, 1915), pp. 1–60; Pratt, *Expansionists of 1812* (New York, 1925), pp. 9–15, 24, 30; *The Crisis of the Dispute with America. By a Merchant of the Old School* (London, 1811). Of very special interest is a pamphlet by Thomas Lee, *Delicate Investigation. The Right of Britons to be Officially Informed Upon this Subject Vindicated. The Question Betwixt Us and Our Brethren In America* (Bristol, 1807), esp. pp. 10–17. (A copy of this pamphlet is to be found in the Goldsmiths' Library, University of London.)

[2] *Correspondence respecting the Seizure of Messrs. Mason, Slidell, McFarlland and Eustis, from on board the Royal Mail-Packet 'Trent' by the Commander of the U.S. Ship 'San Jacinto'* (*Parl. Pap.* (1862), vol. 52, p. 607), pp. 2–3. See also Malkin, 'The *Trent* and the *China*', in this *Year Book*, 5 (1924), pp. 66–77.

[3] Preuss, loc. cit., p. 505, citing Moore, *Extradition*, vol. 1, pp. 282–3.

one Patrick Lawler, a convict who, having escaped from Gibraltar, was seized on Spanish territory by a British prison officer:

'. . . we are of opinion that order ought to be given for setting Lawler at liberty immediately. . . . If any doubt exists, as to what the circumstances really were, inquiry should of course be made; but, for the present, we assume that M. Isturitz has been correctly informed of the facts. If so, a violation of Spanish Territory was committed by the Warder Nicholls, in removing Lawler over and out of Spanish ground, without his consent, and for the purpose of restoring him to a penal custody at Gibraltar, from which he had escaped into Spain. For we regard removal, if effected, as alleged, by means of drugging or intoxication, as being removal clearly without consent, and involving the same international consequences as if it had been accomplished by force. A plain breach of international law having occurred, we deem it to be the duty of the State, into whose territory the individual, thus wrongfully deported, was conveyed, to restore the aggrieved State, upon its request to that effect, as far as possible, to its original position.

'Unless, therefore, Her Majesty's Government have reason to believe that the account given by M. Isturitz is not, in the main, well founded, we recommend that notice be given to the Spanish authorities that, at a given time and place (the place being a convenient spot on the Spanish confines) Lawler will be set at liberty, and allowed to choose his own course: and he should be disposed of accordingly.'[1]

The Law Officers similarly advised that where a foreign State without having obtained the prior consent of Britain conducted persons or ships under arrest through British territory or territorial waters, the British Government was entitled to claim their restoration.[2] Where British authorities brought a man in custody through American territory they advised that a claim for his surrender by the United States could not be resisted.[3]

A recent, if inconclusive, affair which may throw some light upon the obligation of a State whose agents have seized someone on the territory of another State to return the person seized is the case of Eichmann. In May 1960 certain members of the Israeli Security Services seized the Nazi war criminal Adolf Eichmann on Argentine territory. Immediately the seizure was made public the Argentine Republic demanded the return of Eichmann. Israel refused to comply and the matter was referred to the United Nations Security Council which passed a resolution on 23 June 1960 requesting:

'. . . the Government of Israel to proceed to an adequate reparation in accordance with the Charter of the United Nations and the rules of international law.'[4]

The Security Council discussion throws no light on what was regarded as adequate reparation in the circumstances. Prima facie the obligation upon

[1] Lord McNair, *International Law Opinions*, vol. 1, pp. 78–79; see also the case of *McClure*, ibid., pp. 76–77.

[2] Lord McNair, ibid., pp. 80–82; Moore, *Extradition*, vol. 1, pp. 285–7. See also *P.R.O.*, H.O. 45/O.S. 8163; 45/O.S. 8293; 45/9324/17828A; 45/9378/41682.

[3] Lord McNair, op. cit., vol. 1, p. 79.

[4] *The Times*, 24 June 1960.

Israel was to return Eichmann. The position was complicated by a number of factors. It was alleged that Eichmann had voluntarily agreed to go to Israel. Further it was alleged that the persons who seized him had been 'volunteers'.[1] If in fact this meant that they were private citizens acting on their own initiative Israel would not be liable for their acts; on the other hand, if the kidnappers were private citizens acting with the connivance of the Israeli authorities, or were Israeli officials who had volunteered for the particular assignment offered to them by the Israeli authorities, then Israel was internationally liable for their actions. It is unlikely that Eichmann's captors can be regarded as other than agents of the Israeli Government. The Israeli Prime Minister, Mr. Ben-Gurion, in a letter to Mr. Israel Galili, published in the Israeli newspaper *Davar* on 27 May 1960, wrote:

'In my opinion, the importance of the capture of Adolf Eichmann and his trial in Israel lies not in the extraordinary resource and skill of the staff of the Security Services (though it would be difficult to exaggerate the praise they have earned), but in the privilege—which has been afforded through them—of having the entire story of the holocaust revealed in an Israeli court. . . .'[2]

A further factor which might affect the right of the Argentine Republic to demand the return of Eichmann was that she had agreed after the last war not to harbour war criminals;[3] of course, Israel was not a party to such agreement. The outcome of the dispute has been that on 3 August 1960 the two Governments issued a statement that they regarded the incident as closed, although Eichmann was not returned to the Argentine Republic and reparation was not made in any other form.[4] On 18 October 1960 diplomatic relations, which had been broken off in June, were resumed between the two States.[5] In conclusion all that one may say of this incident is that neither State denied that the appropriate reparation for a seizure in violation of international law was restoration of the person seized, and that the peculiar facts of the case either did not constitute a violation of international law or excused a departure from the rule prima facie applicable.

There seems to have been no case in which the United Kingdom has granted monetary compensation to the aggrieved State in addition to restoring to it the person unlawfully seized. Money compensation paid in the *Chesapeake* case was in respect of death and physical injury to the crew as a result of the unlawful attack. Monetary compensation has, however, been awarded in one case, not involving Great Britain. In 1917 a Canal Zone policeman entered Panamanian territory where he arrested one

[1] Argentine note to Israel, 8 June 1960. I am indebted to the Argentine Embassy in London for supplying me with a copy of this note.

[2] I am indebted to the Press Department of the Israeli Embassy in London for the text of this letter.

[3] Green, *Eichmann*, p. 510; see also O'Brien, loc. cit.

[4] *The Times*, 4 August 1960.

[5] *The Times*, 19 October 1960.

Colunje, who was subsequently charged with a criminal offence before a Canal Zone court. After preliminary proceedings the District Attorney entered a *nolle-prossequi*, and Colunje was set free. An arbitral tribunal established by the United States and Panama awarded damages of 500 dollars in respect of Colunje's unlawful seizure and the criminal proceedings subsequently brought against him.[1]

It is uncertain whether the taking of jurisdiction by the courts of the arresting State is an additional wrong under international law, giving a further claim for damages, or whether the only international obligation incurred is to restore the person unlawfully seized.[2] The *Colunje* claim is authority for the view that damages may be claimed for the exercise of jurisdiction by the courts of the arresting State.

Where compensation is demanded for the wrongful seizure abroad of a fugitive and for his subsequent criminal prosecution in the arresting State, a number of difficult problems of State responsibility arise, which it is proposed to mention only very briefly here. Is the asylum State entitled to compensation simply for the affront to its dignity through the exercise by another State of sovereignty on its territory?[3] If the asylum State further claims compensation for the injury done to it via the individual seized does the nationality of claims rule apply? In the *Koszta* case the nationality rule in respect of diplomatic protection was upheld, although by the device of admitting in effect an exception to it.[4] But the unlawful seizure in that case occurred upon Turkish territory and not United States territory, so that the case does not necessarily decide that the asylum State may not exercise diplomatic protection over persons, not its nationals, who are unlawfully seized on its territory. Does the local remedies rule apply where the asylum State claims compensation for the injury done to it as a result of placing the person unlawfully seized on trial before the courts of the arresting State? It does not appear to have been invoked in the *Colunje* claim.

We may now turn to instances in which the recovery of fugitive criminals in violation of customary international law is obtained by means other than the seizure of the fugitive by the agents of one State upon the territory of another. The case of James Napper Tandy, since it seems to have escaped

[1] *U.S. Department of State. Arbitration Series No. 6. American and Panamanian General Claims Arbitration under the Conventions between the United States and Panama of July 28, 1926, and December 17, 1932. Report of Bert L. Hunt, agent for the United States* (Washington, 1934), pp. 733–49.

[2] *American Journal of International Law*, 29 (1935), Supp., p. 624.

[3] For a discussion of some of the kinds of problem involved here see Parry, 'Some Considerations upon the Protection of Individuals in International Law', *Receuil des Cours*, 90 (1956—II), pp. 658–723.

[4] See Moore, *Digest*, vol. 3, pp. 820–54; Borchard, *The Diplomatic Protection of Citizens Abroad, or The Law of International Claims* (New York, 1916), pp. 570–4; Stowell and Munro, *International Cases* (London and New York, 1916, 2 vols.), vol. 1, pp. 298–311.

attention in the modern books, may be worth referring to.[1] Tandy was a prominent member of the United Irish movement at the end of the eighteenth century. Following the unsuccessful Rising of 1798, the Irish Parliament passed an Act attainting those rebels, listed by name therein, who did not surrender themselves to justice before 1 December 1798.[2] At the time the Act was passed Tandy was returning from an unsuccessful attempt to lead a Franco-Irish invasion of Ireland. Arriving in Hamburg, he and three other Irishmen were arrested by the local authorities at the request of Sir James Crawford, the Resident British Minister there, on 24 November 1798. Hamburg at the time was neutral. The position was complicated by the fact that Tandy and one of the others were naturalized French citizens and officers in the French Army. Both France and Britain claimed their surrender. However, following the fall of the Directory, and in consequence of economic pressure by Britain and Russia, Hamburg surrendered the four Irishmen, and they were brought to Ireland. Tandy and Morres successfully defeated an action to enforce execution against them brought in the Irish King's Bench in 1800 on the grounds that, having been imprisoned at Hamburg by the command of His Majesty, they were prevented by the command of the King himself from surrendering before 1 December.[3] Subsequently Tandy was tried and sentenced to death for the part he had played in the attempted invasion of Ireland.

[1] See *A Collection of State Papers relative to the War against France* (10 vols., London, 1794–1801), vol. 9, pp. 22, 37–38, 104–10; Corbet, *La Conduite du Sénat de Hambourge dévoilée aux yeux de l'Europe, ou relation de mon arrestation illégale et de ma détention jusqu'au moment, ou j'ai été livré aux Anglais par le Sénat de Hambourge* (privately printed, Paris, 1807); Fitzpatrick, *The Secret Service under Pitt* (London, 1892), pp. 70–90, 341–5; Gordon, *History of the Rebellion in Ireland in the year 1798, &c.* (2nd ed., London, 1803), p. 337; Harder, *Die Auslieferung der vier politischer Flüchtlinge Napper Tandy, Blackwell, Mores und George Peters im Jahre 1799 von Hamburg an Grossbritannien unter Widerspruch von Frankreich* (Leipzig, 1857); de Martens, *Causes Célèbres du Droit des Gens* (2nd ed., 5 vols., Leipzig, 1858–61), vol. 4, pp. 106–26. Some interesting manuscript material may also be found in *P.R.O.* H. O. 100/100 and /109. For this latter reference I am indebted to Professor Emmett Larkin of the Massachusetts Institute of Technology, and Mrs. M. Carney. See also the entry 'James Napper Tandy' in *D.N.B.*

For an apparent attempt by the British Government to secure the surrender of another Irish revolutionary from Portugal in 1799, see *Memoirs of William Sampson, An Irish Exile; Written by Himself* (London, 1832; reprinted from the 2nd American ed.), esp. pp. 72–126.

[2] 38 Geo. III, c. 80 (Ir.).

[3] See *R.* v. *Tandy and Morres* (1800), 27 *Howell's State Trials*, 1191–1246. The breach of international law, if any, was not pleaded specifically, but the pressure exerted on Hamburg was referred to by Curran in his defence: 'Gentlemen of the jury, I am stating facts that happened in a foreign country; will you expect that I should produce witnesses to lay these abominable offences before you in evidence? It was not in the power of the prisoner at the bar to produce witnesses; he was not of importance enough to call on the armed civilisation of Europe, or on the armed barbarity of Europe, to compel the inhabitants of the town where he was imprisoned to attend at the bar of this Court to give evidence for the preservation of his life; but though such interposition could not be obtained to preserve his life it could be procured for the purposes of blood. And it is one reason why the rights of neutral States should be respected; because if an individual claiming those privileges be torn from that sanctuary, he comes without the benefit of the testimony of those who could save his life' (at 1209). Curran's speech is also reproduced in Curran, *The Life of the Rt. Hon. John Philpot Curran* (London, 1819), vol. 2, pp. 170–89. See also Hale, *John Philpot Curran* (London, 1958), pp. 196–9.

However, the surrender of political fugitives by Hamburg under duress aroused widespread controversy. The French were outraged, as might have been expected, since two of the Irishmen were French officers. The Hamburg Senate protested that they had no alternative but to surrender the fugitives to Britain.[1] Bonaparte dismissed their protest with contempt:

'. . . Courage and virtue preserve States. Cowardice and vice destroy them. You have violated the laws of hospitality. Such an event could not have happened among the most barbarous hordes of the desert. Your fellow citizens must for ever reproach you. . . .'[2]

Napoleon's indignation was perhaps not as sincere as it might seem. In 1804 French mounted gendarmes crossed the Rhine secretly into German territory and seized the Duc d'Enghien who was living at Ettenheim in Baden. The Duc was alleged to have been engaged in a counter-revolutionary conspiracy. He was tried by a special military tribunal and after a short delay shot in the Castle of Vincennes. Attempts to secure the intervention of Napoleon to prevent the execution were unsuccessful.[3]

Hamburg paid France 4,000,000 marks in compensation for the insult and injury done to her by Hamburg's alleged breach of the law of nations in surrendering to Britain two French officers.[4] The British authorities themselves were uncertain as to the propriety of the method of Tandy's arrest. Lord Cornwallis, Lord Lieutenant of Ireland, wrote to the Duke of Portland on 15 February 1801 suggesting that Tandy should be pardoned:

'Considering the incapacity of the old man to do further mischief, the mode by which

[1] A letter, dated 16 December 1799, from the Hamburg Senate to the French Government, explaining their action, is printed in Plowden's *History of Ireland from its Union with Great Britain in January 1801 to October 1810* (3 vols., Dublin, 1811), vol. 1, pp. 130–6. It states, inter alia, that being uncertain as to what course to pursue, the Senate referred the matter to the decision of the King of Prussia. '. . . It does not belong to us to analyse the motives which prevented the King from deciding. You know, that notwithstanding our pressing solicitations, the King always remained undetermined. The Emperor of Russia at last interfered; he did not confine himself to vain menaces during many months, in which our useless resistance continued. We were obliged to support the weight of the most severe hostility on the part of Russia. His squadron commanded the north seas; and blocking up the mouth of the Elbe, took possession of our ships. From information as alarming as well founded, we apprehended, if not effective occupation on the part of the Russian troops, at least their appearance before our gates as enemies. In the meantime, in the midst of these inquietudes, which made us regard our resistance as absolutely useless, and apprehending that by exposing ourselves we should not succeed in saving the prisoners, we did all in our power to satisfy the French Government, and nothing was omitted for obtaining the privilege of detaining the prisoners till peace. We implored the intervention of almost every power, but all our efforts were in vain. . . .

'. . . If, Citizens Consuls, you consider without prejudice, and reflect equitably upon the line of conduct, which our delicate and greatly exposed situation obliged us to adopt, you will be easily convinced that it was absolutely impossible, after a year's fruitless efforts, for us to persist in any longer resistance. Our ruin and entire annihilation would have been the inevitable consequence, as we have shewn. The only means, of preserving ourselves, was that of trusting to the generosity of the French . . .' (pp. 134–6).

[2] Plowden, op. cit., pp. 136–7. It may incidentally be noted in passing that Plowden was an English barrister, a fact which adds some interest to his disapproval of the seizure of Tandy.

[3] See Welschinger, *Le Duc d'Enghien* (Paris, 1913), and Duc de Broglie, *Le Procés et l'execution du Duc d'Enghien* (Paris, 1888).

[4] Plowden, op. cit., p. 129.

he came into our hands, his long subsequent confinement, and lastly the streams of blood which have flowed in this land for these last years I am inclined to request that your Grace will submit the above proposition to His Majesty's favourable consideration.'[1]

Lord Grenville, the Secretary of State, upon whose instructions Sir James Crawford had obtained the arrest of Tandy and the others, was not satisfied that international law had not been violated to a certain extent.[2] M. Otto, the French Minister in London informed Napper Tandy's son that Napoleon had given instructions that the Treaty of Amiens was not to be signed until Tandy was restored to France.[3] The Crown granted Tandy a pardon, and after a short delay he was allowed to proceed to France, where he arrived on 14 March 1802.[4] The Treaty of Amiens was signed on 27 March. As Lecky commented with regard to Tandy:

'. . . Perhaps the most remarkable fact in his career is the wide serious influence it for a short time exercised on the affairs of Europe.'[5]

Tandy's case, although it was not a case involving an unlawful seizure by British agents, involved a violation of international law, or so it was believed by all concerned, and is further evidence of British practice in such circumstances to release the person whose custody has been obtained by a violation of international law.

It seems to be the British practice to allow the prisoner a choice of action on his release. There is no power in the Crown to compel a British subject to return to the country in which he has been unlawfully seized. However, this end can be achieved indirectly if he has been brought to trial by granting him a pardon on condition that he leaves the United Kingdom. This was done in Tandy's case. An alien, of course, may be deported.

(ii) *Seizure in Violation of Conventional International Law*

Having dealt with the position of a person seized in violation of customary international law, one may turn to the problem of the seizure of an individual in violation of an international treaty, to which Britain, the arresting State, may be a party. There seem to be no decided cases or practice on this point. In the United States of America, since treaties are 'part of the supreme Law of the Land',[6] United States courts decline to

[1] *Correspondence of Charles, First Marquis of Cornwallis* (ed. by Ross, 3 vols., London, 1859), vol. 3, p. 338.

[2] See Lecky, *History of Ireland in the Eighteenth Century* (new ed., London, 1892; 5 vols.), vol. 5, p. 74; Ross, op. cit., vol. 3, note on p. 142.

[3] See *An Appeal to the Public by James Tandy Esq., &c.* (2nd ed., Dublin, 1807), p. 119.

[4] The Irish Administration went to some lengths to hide the existence of the pardon, and the reasons for its grant by the Crown, ibid.

[5] Lecky, op. cit., vol. 5, p. 74.

[6] *U.S. Constitution*, Article VI.

exercise jurisdiction over persons or property seized in violation of a treaty to which the United States is a party. The orthodox view is that treaties are not part of the law of England unless legislation has been enacted incorporating them.[1] It seems therefore that British courts would probably not decline jurisdiction obtained in violation of a treaty.

The distinction drawn by U.S. courts between seizures in violation of customary international law and seizures in violation of international convention has been criticized as illogical.[2] But it does seem to be clear that U.S. courts have held explicitly that seizure in violation of customary international law is no bar to their exercising jurisdiction.[3]

The question does not appear to have been considered by English courts whether, when an extradition treaty exists, the seizure of a fugitive criminal by the officials of the arresting State, is in itself a violation of the applicable extradition treaty. It is at least arguable that the principle of good faith in the application of a treaty between two States must require that each State restrict itself to the recovery of fugitive criminals only within the terms of the treaty. However, no British extradition treaty lays down expressly that the High Contracting Parties undertake not to kidnap fugitive criminals from one another's territory.

Although Britain is not a party to the two Optional Clauses in the European Convention of Human Rights, British courts might have to consider the problem of jurisdiction obtained in violation of Article 5 of the Convention. It is uncertain what attitude the British courts would adopt.

While there are no British cases, American courts have had to consider a number of these problems. It has been clearly established by American courts that seizure by U.S. officials of fugitive criminals on the territory of a State with whom the U.S. has an extradition treaty is not *ipso facto* a breach of that extradition treaty. In *Ker* v. *Illinois* (1886)[4] a U.S. official was by Presidential warrant directed to receive a fugitive criminal, Ker,

[1] Contrast *Porter* v. *Freudenburg*, [1915] 1 K.B. 857 and *Fenton Textile Association* v. *Krassin* (1922), 38 T.L.R. 259 with the recent cases of *Republic of Italy* v. *Hambros Bank*, [1950] Ch. 314, and *I.R.C.* v. *Collco Dealings Ltd.*, [1959] 3 All E.R. 351.

[2] See Dickinson, loc. cit.; *Harvard Research*, loc. cit., p. 631.

[3] See *U.S.* v. *Insull* (1934), 8 F. Supp. 310; *Annual Digest, 1933–1934*, Case No. 75; *The State* v. *Brewster* (1835), 7 Vt. 118; *Ex parte Campbell*, 1 F. Supp. 899; *Annual Digest, 1933–1934*, Case No. 190. See also *American Journal of International Law*, 29 (1935), Supp., p. 628.

The Supreme Court of Palestine in *Afouneh* v. *Attorney-General*, *Annual Digest, 1941–1933*, Case No. 97, held that it had jurisdiction over a criminal arrested in Syria in a manner which it was argued on his behalf was in violation of international law. The Court said: 'Counsel on neither side was able to refer us to any authority covering a case such as the present where a person has been irregularly seized not as the result of extradition proceedings at all.' It then proceeded to apply the principles of *Ker* v. *Illinois*, 119 U.S. 436. Cf. the attitude of a French Court in *Re Jolis*, *Annual Digest, 1933–1934*, Case No. 77; *Sirey* (1934), vol. 2, p. 105. Arrest by French officials on foreign territory was of no legal effect: 'The Court therefore declares null and void the whole of the proceedings of July 10, 1933, especially the commitment to prison, and the remand order; and orders the immediate release of Jolis, unless detained for any other matter.'

[4] 119 U.S. 436; 30 L. ed. 421.

from the authorities of Peru. Without presenting his warrant to the Peruvian authorities, or making any demand on them for the surrender of Ker, the messenger arrested Ker and forcibly placed him on board an American ship. The Court stated:

'. . . the main proposition insisted upon by counsel for plaintiff in error in this Court is that by virtue of the Treaty of Extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois; a positive right that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty; and that this right is one he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty amounting to an unlawful and unauthorised kidnapping.'[1]

The Court held that such a proposition could not be sustained in that there was nothing in the Treaty with Peru that expressly gave the fugitive such a right.[2]

This doctrine has been upheld by American courts[3] in a number of cases arising out of the *Rosenberg* case. One of the defendants in that case, Sobell, alleged that he was illegally kidnapped from Mexico. However, this plea to the jurisdiction was raised on Sobell's behalf *after* his conviction. It was held that his failure to make a pre-trial motion challenging the jurisdiction precluded assertion of such matters by motion in arrest of judgment.[4] Nevertheless, Sobell was able to raise the question of his alleged abduction in several later appeals. Thus in 1956 he argued that his kidnapping violated the Extradition Treaty with Mexico and that since that Treaty was the law of the land its violation deprived the U.S. courts of jurisdiction over the offence with which he was charged. The Court replied:

'. . . if the demanding State recovered the fugitive through illegal channels in violation of another nation's sovereignty, that creates a question for the political branches of the government, but does not raise any concerning judicial administration.'[5]

The Court failed to find that there had been any violation of the extradition treaty with Mexico.

On appeal Sobell was equally unsuccessful:

'Appellant's supplementary motion also rests upon the charge that he was forcibly abducted from Mexico by the Mexican Security Police as agents of the United States.

[1] 30 L. ed. 421 at 423–4.

[2] Although the real facts of the arrest of the fugitive in Peru are very different from the facts as found by the U.S. Supreme Court—see Fairman, '*Ker v. Illinois* Revisited', *American Journal of International Law*, 47 (1953), pp. 678–86; the case is, of course, authority only upon the facts as found by the Court.

[3] *U.S.* v. *Rosenberg* (1952), 195 F. 2d 583; *U.S.* v. *Sobell* (1956), 142 F. Supp. 515 (noted *American Journal of International Law*, 51 (1957), p. 124); and *U.S.* v. *Sobell* (1957), 244 F. 2d 520 (noted *American Bar Association Journal*, 43 (1957), p. 742). See also 'The Rosenberg Case: Some Reflections on Federal Criminal Law', *Columbia Law Review*, 44 (1954), pp. 219–60 esp. n. 57, p. 233.

[4] *U.S.* v. *Rosenberg* (1952), 195 F. 2d 583.

[5] Per U.S. District Court Judge Irving Kaufman, *U.S.* v. *Sobell* (1956), 142 F. Supp. 515 at 524–5.

He contends that the alleged abduction was a violation of the Extradition Treaty between the U.S. and Mexico . . . and that as a result the U.S. lacked power to proceed against him. He relies upon *Cook* v. *U.S.* 288 U.S. 102 . . . which holds that the U.S. courts may not acquire jurisdiction by means of treaty violation. As appellant says, his "objection to national, and consequently, judicial power does not rest on the kidnapping or abduction of appellant as such, but rather upon the violation of the Treaty". We must therefore inquire whether there has been a violation of the treaty with Mexico.'[1]

The Court held that the rule in *Ker* v. *Illinois* applied and that there had been no treaty violation, and added:

'Appellant seeks to avoid the impact of the Ker case by insisting that, although there was no treaty violation in that case, there was such a violation in the case at bar. "Unlike the facts in Ker", appellant says, "the petition here charges action by the U.S. Government . . .". Appellant relies on "the actions of the U.S. agents in initiating, planning and participating in the seizure". But it can hardly be maintained still assuming the truth of appellant's charges that the unlawful and unauthorised acts of the Mexican police acting on behalf of subordinate agents of the executive of the U.S. Government were any more acts of the U.S. than the unlawful and unauthorised acts of the emissary of the Chief Executive. We think the question presented is indistinguishable from that before the Supreme Court in Ker, and that our decision here is controlled by that case.'[2]

This case raises a nice point, namely, the extent to which the officials of one State can be regarded as the agents of another for the purpose of making the latter guilty of a violation of international law *vis-à-vis* the former. It is probable that this could only occur if the second State had obtained the participation of the other State's officials by some fraudulent means, e.g. bribery or deception. Otherwise the prima facie rule would prevail, namely, that a State incurs no international responsibility for a seizure otherwise unlawful in which the officials of the State of asylum are the persons who commit the unlawful act.

A related problem is the effect upon proceedings in one American State when a fugitive has been brought within the jurisdiction by unlawful means. No question of the violation of international law is involved here, but as the topic has been the subject of some attention in the United States, it may be worthwhile making some reference to it, involving as it does the question of good faith between member States of the Union, as does seizure in violation of international law between members of the international community.[3]

[1] *U.S.* v. *Sobell* (1957), 244 F. 2d 520 at 524. [2] Ibid., at 525.

[3] See de Grafferied, 'The Law of Extradition', *Alabama Law Review*, 2 (1950), pp. 207–17, esp. pp. 212–13; J. R. R., 'Inter-State Rendition', *Michigan Law Review* (1906–7), pp. 269–70; note: 'Illegal Abduction by State Police: Sanctions for Evasions of Extradition Statutes,' *Yale Law Journal*, 61 (1952), pp. 445–50; note: 'Effect of Illegal Abduction into the Jurisdiction on a Subsequent Conviction', *Indiana Law Journal*, 27 (1952), pp. 292–300; Reid, 'Inter-State Rendition and Illegal Return of Fugitives', *Howard Law Journal*, 2 (1956), pp. 76–93; Scott, 'Criminal Jurisdiction of a State over a Defendant Based upon Presence secured by Force or Fraud', *Minnesota Law Review*, 33 (1952–3), pp. 91–107.

Formerly two States, Nebraska and Kansas, took the view that it would be contrary to public policy for their courts to exercise jurisdiction over a criminal brought before them as the result of an unlawful kidnapping in the territory of another member of the Union.[1] However, the now universal rule is that State courts will exercise jurisdiction even if the accused has been brought before them in an unlawful manner. This practice has met with widespread condemnation by academic commentators. Their opinion was expressed many years ago:

'It is believed that the present state of the law is an inducement to kidnapping and lawlessness, and that Congress should provide such remedy as may be to cure the defect.'[2]

It is believed that as regards the seizure of an accused in one part of the Commonwealth, other than in a self-governing Dominion, and his trial in another part, *Ex parte Scott*[3] would be followed. Where, however, the seizure of an accused took place in one Dominion and his trial in another in such circumstances as would involve a violation of international law, it is believed, but with less certainty, that the same view would be taken, subject to the possibility that Lord Reading's suggestion in *R.* v. *Garrett*[4] might be followed.

B. Apprehension of a Fugitive Criminal in the Territory of State B by private Individuals, Nationals of State A, with the Connivance of the Officials of State A

The basis of the international responsibility of State A for such an unlawful seizure would be its complicity in the unlawful act.[5] The same obligation arises as in the case already discussed in A above for the arresting State to surrender the person seized. The remedies for the individual arrested are the same. It may be noted in addition that the persons making the unlawful seizure may not personally profit from the presence within the jurisdiction of the person seized by bringing a civil action against him.[6] But he may be criminally prosecuted for *any* offence committed within the jurisdiction. This differs from the position of a person who is within the jurisdiction as a result of lawful extradition proceedings. The latter is

[1] In *State* v. *Simmons*, 39 Kan. 262, 18 Pac. 177 (1888) and *In re Robinson*, 29 Neb. 135, 45 N.W. 267, 8 L.R.A. 398 (1890) the courts declined jurisdiction. These cases have now been overruled respectively by *Foster* v. *Hudspeth*, 170 Kan. 338, 224 P. 2d 987 (1950), and *Jackson* v. *Olson*, 146 Neb. 885, 22 N.W. 2d 124, 165 A.L.R. 932 (1946).

[2] J. R. R., loc. cit., p. 470.

[3] 9 B. and C. 446; 109 E.R. 166.

[4] [1917] 86 L.J. (K.B.), 894.

[5] Preuss, loc. cit., p. 507.

[6] See *Lyford* v. *Tyrrel* (1794), 1 Anstr. 85, 145 E.R. 807; *Spence* v. *Stuart* (1802), 3 East 89, 102 E.R. 530; *Barlow* v. *Hall* (1794), 2 Anstr. 461, 145 E.R. 935; *Pooley* v. *Whetham* (1880), 15 Ch. D.

protected by the doctrine that he cannot be prosecuted for any other crime than that for which he has been extradited, but he may be lawfully sued.[1]

The English courts do not seem ever to have had to consider the problem whether they should recognize a foreign civil judgment based upon the presence within the foreign jurisdiction of a defendant who has unlawfully been seized abroad. In the United States the opinion has been expressed that the courts of one State of the Union should not withhold recognition from the civil judgment of another State even where the latters' jurisdiction is based upon an unlawful seizure.[2]

C. Apprehension of a Fugitive Criminal in the Territory of State B by Private Individuals, Nationals of State A, without the Connivance of the Officials of State A

Here the international responsibility of State A is prima facie not engaged. However in such circumstances it seems that the individual seized in violation of the municipal law of State A and/or State B cannot set up his unlawful seizure as a bar to the jurisdiction of a British court to try him for a criminal offence. State B has no remedy under international law.

One example of the seizure by British subjects of a fugitive criminal is that of Joseph Lamb who, being wanted on charges of embezzlement and fraudulent bankruptcy in England was seized, after the Dutch authorities had refused to permit his extradition, by agents of his creditors and hurried on board a British ship in Rotterdam. No claim seems to have been brought by Holland for his restoration.[3]

More important is the case of one Blair who, after committing an offence against the bankruptcy law fled to the United States of America.[4] The offence was not included in the Anglo-American extradition treaty. The creditors sent a detective to contrive Blair's capture. The detective by fraud obtained a warrant from the Governor of Nebraska ordering that Blair be sent to Chicago to answer a charge of making a false declaration to the customs officials there. Surreptitiously, however, Blair was removed to New York and placed on board a British ship. The detective was aided in these unlawful acts by some American citizens. Upon his arrival at Queenstown, Ireland, Blair

'... was handed over to an arresting officer, and committed for trial by the Stipendiary Magistrate at Liverpool. The case was heard before Mr. Justice Mellor, who, notwithstanding the prisoner's protest that he had been irregularly taken in America and brought to England without proper warrant, refused to go into any question of

[1] Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 19. Cf. *R.* v. *Corrigan*, [1931] 1 K.B. 527.
[2] Ehrenzweig, *Conflict of Laws* (St. Paul, 1959), pp. 197–8.
[3] *P.R.O.*, H. O. 45/O.S. 8416.
[4] *P.R.O.*, H. O. 45/9399/51458. See also Moore, *Extradition*, vol. 1, p. 285.

international law, and tried him in the usual way, sentencing him to eighteen months' imprisonment.[1]

'On the representation of the United States Government that there had been a breach of international comity, the opinion of the Law Officers was taken.'[2]

The Law Officers, Holker, Giffard, and Deane, reported as follows:

'We are of Opinion:

'1. That no wrong has been done by the Government of Her Majesty. That Blair being within the jurisdiction of the Court by which he was tried, for an offence committed in this country, was convicted in due course of law. We therefore see no sufficient reason for advising him to be set at liberty.

'2. That Her Majesty's Government supposing Blair were set at liberty, has no power to restore him to the jurisdiction from which he was taken.

'3. That the act of the persons who brought Blair away from America, some of whom were citizens of the United States, is one for which Her Majesty's Government cannot properly indemnify him. He may bring his action for assault and false imprisonment and so recover damages.

'4. That the parties who brought Blair over should be indicted.

'We have confined ourselves to the more legal aspect of the case, but we think that a gross outrage has been committed on the dignity of the Governors of the States, and the Government of the United States. In that view Her Majesty's Government might as a matter of policy, direct that Blair should be pardoned, and if the pardon were on condition that he returns to the United States, the object of the Government of the United States might possibly be attained.

'If such conditional pardon should be granted, a further condition that he should not return to this country till the expiration of the time for which he has been convicted should, we think, be imposed.'[3]

Sir Thomas Henry, the Chief Metropolitan Magistrate, commented on the above Report in a letter to the Home Office, dated 14 February 1876:

'. . . I venture, with all deference to the opinion of the Law Officers, to think that the English Government ought not *to give effect* to a sentence which was obtained by fraud, and that they cannot resist the application to discharge Blair from custody; it would be a violation of the Comity of Nations if a private prosecutor were allowed to obtain the capture of an accused by fraud, and forcibly to bring him away from a country in which he had a right of asylum.'[4]

[1] Cf. letter from Mr. Justice Mellor to the Home Secretary, 5 February 1876. *P.R.O.*, H. O. 45/9399/51458/6. According to the report of the trial which appeared in the *Liverpool Mercury* of 13 December 1875, Mr. Justice Mellor said 'they were not there to discuss the international consequences of that act of which the prisoner complained. It did not matter what device brought the prisoner here. He was there, and charged with an offence against English law, and he must be tried.'

[2] *Savarkar Arbitration: Reply presented on Behalf of the Government of His Britannic Majesty to the Counter-Case presented on behalf of the Government of the French Republic* (London, 1911), p. 48. See also Annex XXII to *Affaire Savarkar: Contre-Mémoire présenté par le Gouvernement de la République Française* (Paris, 1911), pp. 105–6.

[3] *P.R.O.*, H. O. 45/9399/51458/8 (Opinion of 12 February 1876). It should be noted that Holker, the Attorney-General, was at first opposed to such a solution, see his letter to the Home Secretary, dated 7 February 1876: *P.R.O.*, H. O. 45/9399/51458/11.

[4] *P.R.O.*, H. O. 45/9399/51458/9.

The final outcome of the affair was that Blair was pardoned on condition that he sailed to the United States and did not return to the United Kingdom during the term of his sentence. His expenses were paid to Chicago. No indemnification other than this was paid to him:

'It will be seen that, while the exact apportionment of blame for the outrage was not established, British subjects, not public officers, were parties or privies to the outrage, and that their prosecution was recommended. This was a clear case of the use of fraud or illegal means by American citizens with the aid or privity, or at the instance of British subjects.'[1]

D. Irregular Apprehension of a Fugitive Criminal in State B, by an Official of State B, Prior to his Extradition to State A

Two problems require consideration here. First, what effect has a breach of the municipal law of the asylum State upon the legal position of the person extradited when he comes before a British court? The answer is that it is for each State to vindicate its own municipal law. If some irregularity in the extradition proceedings occurs in the asylum State such that the irregularity is solely a breach of its municipal law this will not affect the jurisdiction of the British court.[2] Even if the breach of the municipal law of the asylum State is also a breach of the Extradition Treaty with that country the position will be unaltered. This is because the Extradition Act, 1870, makes separate and distinct provision for the surrender of fugitive criminals *by* the United Kingdom and for the surrender of fugitive criminals *to* the United Kingdom. In the case of the former the operation of the Act is made subject to the provisions of the Extradition Treaty as embodied in the Order in Council bringing the Extradition Act into operation *vis-à-vis* a particular State.[3] In the case, however, of surrender *to* the United Kingdom the only relevant section of the Act contains no such provision, merely specifying that the speciality principle shall be applied.[4] The only irregularity therefore that may be invoked by a fugitive criminal surrendered to the United Kingdom is a breach of the principle of speciality, which, of course, can occur only *after* his surrender to this country.

The second problem is concerned with irregularities occurring in the United Kingdom in the course of the proceedings which may ultimately lead to the fugitive criminal being extradited. Where his original arrest takes place in an irregular manner he may be entitled to be released. Thus in *R.* v. *Metropolitan Police Commissioner, Ex parte Melia* (1957)[5] a person

[1] *Savarkar Arbitration: Reply, &c.*, p. 49.

[2] Cf. *R.* v. *O/C Depot Battalion R.A.S.C. Colchester. Ex parte Elliott*, [1949] 1 All E.R. 373; *R.* v. *Hall* (1918), 42 D.L.R. 330.

[3] 33 & 34 Vict., c. 52, ss. 2, 3, 4 and 5.

[4] 33 & 34 Vict., c. 52, s. 19.

[5] [1957] 3 All E.R. 440; [1957] 1 W.L.R. 1065.

arrested in Britain on an Irish warrant was released because it was held that the warrant had not been properly indorsed by the British authorities.[1] Such a discharge is, however, no bar to re-arrest under a warrant that has been properly indorsed, and subsequent transmission to Ireland.[2]

Sometimes it has happened, as in *R.* v. *Weil*[3] that, in order to act quickly so as to prevent the escape of a fugitive criminal, a request for whose arrest with a view to extradition is expected in the near future, an arrest may be made without authority. In *R.* v. *Weil* it was held that such an unlawful arrest was no bar to surrender for extradition; under section 8 of the Extradition Act, 1870,[4] a fugitive criminal who is already in custody may be detained for an offence coming within the Act with a view to his surrender, notwithstanding that he was originally arrested without a warrant.[5] Brett L.J. added:

'. . . I doubt whether there has been any irregularity whatever in the proceedings. I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country.'[6]

Sir Francis Piggott was very critical of this decision, and in particular of Brett L.J.'s dictum, which, Sir Francis claimed

'. . . seems to set at nought the fundamental principles on which extradition rests, for it denies the common law right to be at liberty if no offence against the law of England has been committed. The Extradition Act provides the only way in which that right may be broken in upon. . . .'[7]

It is of interest to note that in *Diamond* v. *Minter* (1941)[8] it was held that a person suspected of committing elsewhere an offence which would be a

[1] See the similar Irish case of *St. George Campbell Laing* (1927), *Police Journal*, 25 (1952), pp. 115–16, and *The State* (*Rossi and Blythe*) v. *Bell*, [1957] I.R. 281, 91 I.L.T.R. 143.

[2] This is what happened in the Irish case of *The State* (*Rossi and Blythe*) v. *Bell*, see above. Blythe and Rossi were discharged, but re-arrested on fresh, and presumably valid, warrants as they left the Court. S. 5 of the Habeas Corpus Amendment Act, 1679 (31 Car. II, c. 2) has no application here. See *Governor of Brixton Prison, Ex parte Stallmann*, [1912] 3 K.B. 424, and *R.* v. *Secretary of State, Ex parte Bould*, [1942] 2 K.B. 14.

[3] (1882), L.R. 9 Q.B.D. 701. Followed in *Re Stallmann* (1911), I.L.R. 39 Calc. 164; dissented from by Sir Francis Piggott C.J. in *Re Iu Ki Shing alias Iu Chan and in the Matter of the Chinese Extradition Ordinance* (1908), 3 Hong Kong L.R. 20. See also Reuschlein, 'Provisional Arrest and Detention in International Extradition', *Georgetown Law Journal*, 23 (1934), pp. 37–78. This valuable article does not, however, deal with irregularities in the provisional arrest of persons whose extradition has been requested.

[4] 33 and 34 Vict., c. 52.

[5] Cf. *Re Weyer* (1951), *International Law Reports*, Case No. 168 (Argentine Court of Second Instance; detention before official request for extradition received is unlawful); *Re Manovratia, Annual Digest, 1935–1937*, Case No. 175 (Italian Court of Cassation; State may lawfully provide for provisional arrest of longer duration than that specified as maximum in Treaty); *Re Boyer and Peres, Annual Digest, 1933–1934*, Case No. 155 (Brazilian Federal Supreme Court; provisional arrest unlawful before formal request for extradition received); *Re Larrieu, Annual Digest, 1949*, Case No. 92 (Belgian Court of Cassation, Second Chamber; fact that prisoner was unlawfully detained pending surrender does not invalidate subsequent order for extradition).

[6] L.R. 9 Q.B.D. 701 at 706.

[7] Piggott, loc. cit., p. 91.

[8] [1941] 1 K.B. 656; [1941] 1 All E.R. 390. This view is accepted as correct in Moriarty and Williams, *Police Law* (15th ed., London, 1959), p. 19.

felony if committed in the United Kingdom may not lawfully be arrested without a warrant.

Sir Francis Piggott pointed out that *R.* v. *Weil*

'. . . would seem to lay down the doctrine that wrong procedure in the arrest of a person may be subsequently set right, so long as the man is got hold of; and so long as the subsequent proceedings are regular the wrongfulness of the preliminary proceedings is immaterial. . . .'[1]

He later added:

'. . . the further question arises . . . how much irregularity will the Court be disposed to pass by.'[2]

The answer to Sir Francis Piggott's last point is that British courts are, it seems, disposed to pass by quite a number of irregularities. Thus supposing a person was seized abroad in violation of international law, and brought to Britain could he be lawfully extradited to a third State? Even if for the purpose of a prosecution for crime here the Courts hold that they have jurisdiction, will they have jurisdiction for the purpose of ordering his extradition? In a dictum in *Re Parisot* (1890)[3] Baron Huddleston stated expressly:

'The jurisdiction under the Extradition Act attaches if the prisoner is in England, even if illegally arrested.'[4]

This view is supported by the definition of *fugitive* criminal in the Extradition Act, 1870, as a person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State 'who is in or is suspected of being in some part of Her Majesty's dominions'.[5] The terms of most British extradition treaties provide for the surrender of fugitive criminals who are present within the territory of the asylum State. A person present in Britain even as the result of a violation of international law may it seems be extradited without conflict with the British Extradition Acts or treaties. However, extradition under such circumstances would probably constitute an additional international delinquency.

Further, in a number of cases[6] where a certain procedure has been prescribed by treaty for setting the machinery in motion for the surrender by the United Kingdom of a fugitive criminal it has been held that failure to comply with such treaty provision will not prevent extradition taking place. Thus the Anglo-Belgian Treaty of 29 October 1901[7] required that the requisition for surrender made by Belgium and addressed to the

[1] Piggott, loc. cit., p. 91.
[2] Ibid., p. 92.
[3] 5 T.L.R. 344.
[4] Ibid., at 345.
[5] 33 & 34 Vict., c. 52, s. 26. Cf. Billot, *Traité de l'Extradition* (Paris, 1874), pp. 60–63, where a view similar to that of Baron Huddleston is taken.
[6] *Re Elsie Counhaye* (1873), 8 Q.B. 410; *R.* v. *Governor of Brixton Prison*, [1911] 2 K.B. 82.
[7] *Fugitive Criminal*, p. 35.

Secretary of State should be accompanied by certain documents. Where Belgium made a requisition without enclosing the necessary documents it was held that this would not prevent the surrender of the fugitive.[1] Such decisions are not easy to reconcile with the express provision of the Extradition Act, 1870, that the Act applies only subject to the conditions contained in the Treaty.[2] One cannot help feeling that in such cases the Court has been influenced by a desire not to allow a person prima facie guilty of an offence to escape surrender on the grounds of a mere technicality. Indeed, the courts have expressly asserted in a number of extradition cases that they will not give effect to technical arguments having nothing to do with the merits.[3]

On the other hand, it should be noted that if there is no extradition treaty with a particular State or the Treaty does not include the particular offence with which the fugitive is charged, magistrates who order the arrest of a fugitive may expose themselves to an action for false imprisonment. In 1872 the English police arrested Jacob D'Otis at the instance of a gentleman from New York on a charge of having absconded with £40,000 belonging to his American employers. The magistrates at Wrexham ordered D'Otis to be sent before the Bow Street magistrates to decide whether he should be committed for surrender or not. He was released from custody as the result of habeas corpus proceedings. The offence with which he was charged was not included in the Anglo-American Extradition Treaty. D'Otis then sued the two Wrexham magistrates concerned for false imprisonment and at the Chester Assizes on 15 July 1875 Lord Coleridge C.J. awarded D'Otis £500 damages against each of the two defendants.[4]

In contrast with the judicial tendency described above not to allow fugitives to avail themselves of technicalities is the view expressed on behalf of Her Majesty's Government in the case of Kent.[5] John Kent was charged at Liverpool in 1844 with the murder of an American on board an American ship on the high seas. He was arrested by order of a Liverpool magistrate, although, of course, English courts did not have jurisdiction over crimes committed on the high seas on foreign vessels, and a verdict of justifiable homicide was given in his favour by a coroner's jury. The magistrate refused to commit him for trial. However, while he was thus unlawfully detained in custody, the American Minister, Everett, applied for his extradition to the United States, the crime of murder being within the terms of the Webster-Ashburthon Treaty of 1842, Article X. Lord Aberdeen

[1] *Re Elsie Counhaye* (1873), 8 Q.B. 410. Cf. *R.* v. *Wilson* (1877), L.R. 3 Q.B.D. 42 and *R.* v. *Ashforth* (1892), 8 T.L.R. 283.

[2] 33 & 34 Vict., c. 52, ss. 2, 3, 4 and 5.

[3] *R.* v. *Governor of Brixton Prison. Ex parte Van der Auwera*, [1907] 2 K.B. 157 at 163; *R.* v. *Governor of Brixton Prison. Ex parte Servini*, [1914] 1 K.B. 77 at 81.

[4] *P.R.O.*, H. O. 45/9313/13894.

[5] *P.R.O.*, H. O. 45/O.S. 678.

wrote on behalf of Her Majesty's Government on 26 December 1844 to Everett declining to surrender Kent:

'. . . the undersigned, without wishing to provoke discussion, must be permitted to express a doubt whether, in justice, a prisoner arrested on accusation of having committed a crime, of which he was subsequently declared innocent by a coroner's jury, and which moreover was by the highest law authority declared not cognisable by English law, could after such acquittal and such declaration, be delivered over by the Magistrate to the United States Consul. It appears very questionable to the undersigned whether such advantage could properly be taken of an imprisonment which turned out to be unlawful, to place the person so imprisoned in the hands of another party, in order that they should proceed against him on other grounds.

'The undersigned conceives that had the Government so acted, they would have rendered themselves liable to severe and just reproach; and that the Magistrate might have exposed himself to an action at law on the part of the prisoner.'[1]

E. Mistaken Surrender of a Fugitive Criminal by one State to Another

This heading covers a number of miscellaneous situations. Thus, supposing the mistake is induced by the fraud or deception on the part of the requesting State, it would seem that an obligation would arise to return the person whose custody was thus unlawfully obtained.[2] On the other hand, if the mistake is as to the existence of an obligation to surrender where no fraud or deception is practised to induce the mistake, there would seem to be no such duty to return the person mistakenly surrendered. In certain cases where British officials have handed over fugitives to a foreign power in the absence of any obligation to do so, the British Government has contented itself with reprimanding the officials concerned for their unlawful acts. In 1814 certain political refugees from Spain were surrendered by the Governor of Gibraltar to the Spanish authorities.[3] Although this incident led to an outspoken debate in the Commons,[4] no action seems to have been taken to secure the return of the fugitives. In 1853 five Russian sailors who had deserted from the frigate *Aurora* were handed over by the British police to a Russian naval lieutenant to be returned in custody to their ship. The Law Officers reported that

'. . . the delivering up of the Russian sailors to the Lieutenant and the assistance afforded by the Police for the purpose of their being conveyed back to the Russian ship was contrary to law.'[5]

[1] *P.R.O.*, H. O. 45/O.S. 678/7. The 'highest law authority' referred to were the Law Officers, whose opinion had been taken.

[2] Cf. *Savarkar* case (1911), in Scott, *Hague Court Reports* (New York, 1916), pp. 275–83. Wilson, *Hague Arbitration Cases* (Boston and London, 1915), pp. 230–7; *Protocoles des Séances et Sentence du Tribunal d'Arbitrage, &c.* (La Haye, 1911), p. 58.

[3] *Papers Relating to Gibraltar and Spain* (*Parl. Pap.* (1814–15), (116) (36) (59), vol. 9, p. 465); *Papers Relating to Persons Sent from Gibraltar to Cadiz* (*Parl. Pap.* (1814–15), (116) (36) (59), vol. 9, p. 469); *Further Papers Relating to Persons sent from Gibraltar to Cadiz* (*Parl. Pap.* (1814–15), (116) (36) (959), vol. 9, p. 473).

[4] *Parliamentary Debates* (1815), vol. 29, esp. pp. 1136–9.

[5] Report of 3 January 1854, *P.R.O.*, H. O. 45/O.S. 5830.

No claim seems to have been made that the sailors should be restored to the United Kingdom.

More recently there has been some evidence of a tendency to request that fugitives surrendered as the result of a mistake should as an act of comity be restored. In 1882 certain Cuban political prisoners escaped from Spain to Gibraltar. Acting at the request of the Spanish Consul a Gibraltar magistrate ordered their deportation to Spain. The fugitives, being political offenders, could not have been extradited under the Anglo-Spanish extradition Treaty. Nor did they belong to the category of persons against whom the Gibraltar Aliens' Order in Council, giving magistrates the power of deportation, had been directed. The Law Officers advised that although there was no legal basis for a claim for the restoration of the Cubans to Gibraltar the Spanish Government ought not to have taken advantage of the mistake.[1] Accordingly, the British minister in Madrid was instructed to explain to the Spanish Government

'. . . that the surrender of the prisoners having taken place by reason of a mistake on the part of our police authorities, their redelivery by the Spanish Government, with a view to the case being dealt with in accordance with the Extradition Treaty between Spain and Great Britain would be a gracious and friendly act which Her Majesty's Government would highly appreciate, but which, in their opinion, must be left entirely to the chivalry and generosity of the Spanish Government.'[2]

This approach met with little response and the British Government reiterated their request for the return of the Cubans on a number of occasions, attaching increasing importance in their communications to the fact that the mistake would never have occurred but for the original request by the Spanish consul for their expulsion. The affair dragged on for several years, and the Spanish Government eventually set the Cubans at liberty.

Another case was that of Lamirande in 1867:

'Lamirande, a cashier at the Poitiers branch of the Bank of France, was arrested in Canada under an extradition warrant on a charge of forgery. After the prescribed inquiry he was committed to prison for surrender to France. He applied to a superior tribunal to quash the proceedings against him on the ground that the evidence did not establish that he had committed forgery, and that his surrender was not warranted by the Extradition Treaty then in force. While these proceedings were pending, having

[1] Lord McNair, *International Law Opinions*, vol. 2, p. 64 (reprinted McNair, 'Extradition and Extraterritorial Asylum', in this *Year Book*, 28 (1951), p. 192.

[2] *Correspondence Respecting the Expulsion of Certain Cuban Refugees from Gibraltar*, C. 3473 (*Parl. Pap.* (1883), vol. 82, p. 569), pp. 3–4. See also *Correspondence Respecting the Expulsion of Certain Cuban Refugees from Gibraltar*, C. 3452 (*Parl. Pap.* (1882), vol. 45, p. 393); *Further Correspondence Respecting the Expulsion of Certain Cuban Refugees from Gibraltar*, C. 3475 (*Parl. Pap.* (1883), vol. 82, p. 597) ; *Further Correspondence Respecting the Expulsion of Cuban Refugees from Gibraltar*, C. 3548 (*Parl. Pap.* (1883), vol. 82, p. 603); *Further Correspondence respecting the Treatment of the Cuban Refugee Maceo*, (C. 3629 (*Parl. Pap.* (1883), vol. 82, p. 615); *Further Correspondence respecting the Treatment of the Cuban Refugee Maceo*, C. 3883 (*Parl. Pap.* (1884). vol. 87, p. 585).

been adjourned by the judge, an application was made to the Governor-General of Canada to issue the executive warrant necessary to effectuate the surrender of Lamirande. The Governor-General, in complete ignorance that proceedings were pending before the superior tribunal, issued his warrant, and Lamirande was put on board a French ship and taken to France for trial. In the view of the judge of the Canadian court, who was seized of the case, and of the British Law Officers, the offence charged against Lamirande was not within the Treaty, and the surrender was made in error, and so far as Canadian law was concerned illegally. . . .

'His Majesty's Government submitted to the French Government that the extradition was not authorised by the Convention of the 13 February 1843, which then regulated extradition between Great Britain and France, or the statute (6 & 7 Vict., c. 75), by which it received municipal effect, (1) because the demand was not made through diplomatic channels and (2) because the offence charged was not within the Treaty.

'For these reasons they asked the French Government to remit Lamirande to Canada, that the question of his liability to extradition might be there legally decided. This, however, was asked for as a matter of comity, and not as a matter of international obligation.'[1]

France declined to accede to this request. Lamirande himself, while the diplomatic discussion of the case was proceeding, formally renounced the benefit of any decision that might be reached in favour of his return to Canada.

A later case occurred in 1901 when a British officer, by the name of Keyes, was killed in Nigeria by French subjects who subsequently escaped to French territory.

'. . . The fugitives were handed over to the authorities of Nigeria by a French officer, who seems not to have known or to have forgotten that as French citizens they were not liable to extradition, and could not lawfully be removed from French territory. His Majesty's Government restored these men to the French authorities with full knowledge that they could and would be tried by French law for their acts; but this restoration was granted as a matter of comity, and without any admission of obligation under international law.'[2]

The view of the British Government as to the legal consequences of an erroneous surrender was expounded in 1911 as follows:

'. . . a surrender freely made by the agents of a Government, unless it was obtained by deception or other fraudulent means, cannot subsequently be claimed, as a matter of right, to be entirely nullified, so as to involve the restitution of the surrendered person, on the mere ground of some irregularity in the proceedings.'[3]

[1] *Savarkar Arbitration: Case presented on behalf of the Government of His Britannic Majesty, &c.* (London, 1910), pp. 16–17; *Savarkar Arbitration: Counter-Case presented on behalf of the Government of His Britannic Majesty* (London, 1911), pp. 21–22, 28–39; *Reply presented on behalf of the Government of His Britannic Majesty, &c.* (London, 1911), pp. 26–36, 52–56; Sir Edward Clarke, op. cit., pp. 116–18, 218–19; *British and Foreign State Papers* (1867–8), vol. 58, pp. 1191–1214; *Correspondence on the Extradition of M. Lamirande* (*Parl. Pap.* (1867), vol. 48, pp. 633, 727). See also *Re Lamirande* (1867), 10 Low. Can. Rep. 280; 2 Can. L.J. 28; 4 Can. L.J. 486.

[2] *U.K. Case*, pp. 17–18. See also Leboucq, 'De l'Erreur sur la Nationalité des Extradés', *Clunet*, 30 (1903), pp. 281–7, esp. p. 283.

[3] *U.K. Reply*, p. 38. Cf. the attitude of German courts, *Extradition* (*Germany and Italy*) case,

The problem of the mistaken surrender of a criminal by a British official to a foreign country was referred to briefly by Sir Francis Piggott:

'. . . The machinery of our law can only act to prevent or redress infringements of the law; and it is obvious that it can only prevent illegal extraditions if it is called upon in time, and this only with regard to action by our own executive.'[1]

A curious incident occurred in 1886. Great Britain requested the surrender from Sweden of one Dubois upon a charge of uttering forged bonds in London. The Swedes arrested and extradited to Britain under the name Dubois another man named Truscovitch, with whom Dubois had had some dealings before Truscovitch had fled to Sweden. When Truscovitch was brought to trial in England a motion to quash the indictment was made on his behalf on the ground that the extradition warrant having been granted against Dubois, Truscovitch was not in lawful custody and the Court had no jurisdiction over him. The Common Serjeant overruled this objection, giving no reasons.[2] The case is unsatisfactory as the relevant facts are not clear. The headnote sums up the case by saying:

'A person may be tried in England even if the name under which he was surrendered be not his true name.'

However, if it had been established that both Sweden and the United Kingdom agreed on the surrender not of Truscovitch but of another man, then Truscovitch might have invoked section 19 of the Extradition Act, 1870,[3] which provides that a person surrendered may be tried only for such extradition crimes as may be proved by the facts upon which *his* surrender was grounded. In so far as Truscovitch was surrendered on evidence relating to Dubois, the extradition of Truscovitch was not based upon any evidence.

The position of the United States on this question has been summed up so far as the U.S. courts are concerned as follows:[4]

'The irregularity of the proceedings in the asylum country leading up to the issuance of the warrant and surrender will not be examined into in the courts of the demanding country.'[5]

Annual Digest, 1929–1930, Case No. 167; *Re Becker and Hauschke, Annual Digest, 1931–1932*, Case No. 164; *Extradition* (*Jurisdiction*) case, *Annual Digest, 1935–1937*, Case No. 165 (German Supreme Court, Criminal Matters: 'Regardless of the fact whether extradition is regulated by treaty or whether it is only agreed upon in every single case, the following principles have been established by the practice of the Supreme Court in respect of the question whether German courts may review the proceedings taken by the authorities of the extraditing State: Neither the legality of the procedure followed by the extraditing State nor the legality of the extradition as such are subject to review by German courts').

[1] Piggott, loc. cit., p. 9.

[2] *R.* v. *Finkelstein and Truscovitch* (1886), 16 Cox C.C. 107.

[3] 33 & 34 Vict., c. 52.

[4] *Corpus Juris Secundum*, vol. 35, p. 374 (citing *Hall* v. *Patterson*, C.C.N.J. 45 F. 352, and *Kelly* v. *State*, 13 Tex. App. 158).

[5] A very interesting problem seems recently to have arisen in the U.S.A., details of the outcome of which seem not yet to be readily accessible. Some Spanish sailors deserted from Spanish naval

The leading case on erroneous surrender is the *Savarkar* case (1911) decided by the Permanent Court of Arbitration. Lord McNair, it must be noted at the outset, states categorically:

'The Savarkar Case . . . is not a case of erroneous surrender, because the French Government had agreed with the United Kingdom that he should remain in British custody while on French territory.'[1]

The facts were that Savarkar, an Indian revolutionary, was being sent back for trial in India under the provisions of the Fugitive Offenders Act, 1881. He travelled in the custody of Indian police officers on a ship which was due to call at Marseilles. Anticipating an attempt to rescue Savarkar by Indian nationalists, the British police requested the French police to take the steps necessary 'to ensure the safety [*sic*] of the prisoner while in port at Marseilles'.[2] On the 7 July Savarkar arrived at Marseilles. On the 9 July the French Police replied to the British request, stating that the necessary instruction had been given to avoid any incidents while Savarkar was on board the British vessel in Marseilles. But already, on the morning of the 8 July, the incident which gave rise to the dispute occurred. Savarkar jumped overboard in an attempt to escape and swam ashore. On reaching dry land he surrendered himself to a French Brigadier. The French policeman took hold of Savarkar, of whose identity he was allegedly unaware and, hearing cries of 'Arretez-le' from the ship, started to lead Savarkar back to the ship. Before they reached it, three persons, who had come from the ship, came up to the Brigadier and assisted him to reconduct Savarkar on board. The ship bearing Savarkar did not sail until the next day and it was not until 18 July that the French Government took any action. On these facts the Permanent Court of Arbitration was asked to decide:

'Should Vinayak Damodar Savarkar, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic?'[3]

As regards the question whether or not this is a case of erroneous surrender, it was argued on behalf of Britain that the mistake, if any, made by the

vessels visiting Mexico; by mistake, for there were no legal grounds for their surrender, they were handed over to the U.S. authorities, to whom Spain then made a requisition for their surrender under the Spanish-American extradition treaty. It is not yet possible to ascertain whether the sailors were in fact surrendered to Spain or returned to Mexico. The background to this case is found in the *New York Times*, 6 July 1957, p. 4, col. 5; 2 August, p. 3, col. 1; 12 August, p. 18, col. 7; 14 August, p. 10, col. 5; 23 August, p. 18, cols. 6–7; 28 August, p. 26, col. 7.

[1] *International Law Opinions*, vol. 2, p. 64. Sir Hersch Lauterpacht thought it a case of mistaken surrender; *The Function of Law in the International Community* (Oxford, 1933), pp. 88–90. See also Hamel, 'Les Principes du droit d'extradition et leur application dans l'Affaire Savarkar', *Revue de Droit International et de Legislation Comparée*, 2nd ser., vol. 13, pp. 370–403.

[2] *Savarkar Arbitration, U.K. Case*, p. 4.

[3] *Agreement between the United Kingdom and France Referring to Arbitration the case of Vinayak Damodar Savarkar. Signed at London, October 25, 1910.* Treaty Series No. 25/1910. Cd. 5394, 1910 (*Parl. Pap.* (1910), vol. 112, p. 499).

French Brigadier, as to French law or his powers thereunder, was not a matter of international concern.[1]

The award is short and does not decide many of the contested issues of fact. It does, none the less, clearly state in its final paragraph that a mistake committed by an official in circumstances such as those in which Savarkar was surrendered could not in international law give rise to an obligation to restore the prisoner to France.[2]

It would appear, therefore, that under international law there is no obligation to restore a person surrendered under a mistake. However, British practice suggests that in such circumstances it is believed that as a matter of comity, the person whose custody has been obtained in this way should be returned.

The position of a person surrendered under a mistake before a British court is that the irregularity in the procedure adopted by the surrendering State is not a bar to an English court exercising criminal jurisdiction. Authorities for this are *Sinclair* v. *H.M. Advocate* (1890),[3] *Afouneh* v. *Attorney-General* (1941)[4] and *Youssef Said Abu Dourrah* v. *Attorney-General* (1941).[5] The last two being Palestinian cases are only of persuasive authority.

In *Sinclair* v. *H.M. Advocate*, Sinclair was found in Portugal and arrested by the Portuguese authorities, who had been informed that a warrant had been issued by a Scottish magistrate for his arrest on charges of breach of trust and embezzlement. Although there was no extradition treaty at the time between Portugal and Britain, Sinclair was detained for a month by the Portuguese authorities without any charge being made against him or inquiry instituted or warrant produced. They ultimately placed him on a British ship and he was brought to Scotland. Sinclair having been convicted by a Scottish Court applied to the Scottish Court of Judiciary to have the proceedings quashed on the ground *inter alia* that his arrest in

[1] *Savarkar Arbitration, U.K. Reply*, p. 26.

[2] *Protocoles des Séances et Sentence* (The Hague, 1911), p. 58: 'Whereas, having regard to what has been stated, it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not in the circumstances of the arrest and delivery of Savarkar to the British Authorities and of his removal to India anything in the nature of the violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.

'Whereas, in the circumstances cited above, the conduct of the brigadier not having been disclaimed by his chiefs before the morning of 9th July, that is to say before the 'Morea' left Marseilles, the British Police might naturally have believed that the brigadier had acted in accordance with his instructions, or that his conduct had been approved.

'Whereas, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British Police, there is no rule of International Law imposing, in the circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.'

[3] 17 *Rettie Justiciary Cases*, 38.

[4] *Annual Digest, 1941–1942*, Case No. 97.

[5] Ibid., Case No. 101.

Portugal was unwarranted, illegal and oppressive. Lord Maclaren, giving one of the judgments, said:

'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we have nothing to do. The extradition of a fugitive offender is an act of sovereignty on the part of the State who surrenders him. Each country has its own ideas and its own rules in such matters. Generally, it is done under treaty arrangements, but if a State refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions and we have neither interest to inquire into the regularity of the proceedings under which he is apprehended and given over to the officials to receive him into custody.'[1]

In *Afouneh* v. *Attorney-General* the appellant had been arrested in Syria, then occupied by the Allied Forces, by a British soldier and handed over to the Palestine police. Extradition between the two countries was governed by Treaty with which this procedure was not in conformity. The Supreme Court of Palestine said:

'If there is an extradition agreement between two countries and a request for extradition is made, the Government to whom the extradition is made must satisfy itself that the formalities of the agreement have been complied with. It is a matter for them and not for the Government which is making the application. When once the accused has been handed over to the requesting government the position would seem to be that subject to the limitation that he cannot be tried for an offence other than that for which he was extradited, he cannot avail himself of the plea that the government to whom the request was made should not have extradited him at all because certain irregularities of procedure had occurred. Authority for this view is provided by the old case of *Ex parte Scott* (1829) 9 B. and C. 446.'

This was entirely *obiter* since it was held that there had been no extradition. Afouneh, indeed, contended that his arrest was in violation of international law. It may further be noted that *Ex parte Scott* is hardly authority for the above principle. The ratio of *Ex parte Scott* is that an arrest in violation of English law or a foreign municipal legal system is no bar to the exercise of criminal jurisdiction when the person so arrested is found within the jurisdiction of an English court.

In *Youssef Said Abu Dourrah* v. *Attorney-General*, the Palestine Supreme Court again applied the doctrine that once the person has been surrendered he cannot raise any irregularity in the procedure adopted by the surrendering State as a bar to the courts of the requesting State exercising criminal jurisdiction over him.[2]

If a request for extradition is made by Britain and the State of asylum surrenders the fugitive criminal without going through the procedure laid

[1] 17 *Rettie Justiciary Cases*, 38 at 43.

[2] Cf. two German judgments to similar effect: *Extradition* (*Germany and Italy*) case, *Annual Digest, 1929–1930*, Case No. 167, and *Extradition* (*Jurisdiction*) case, *Annual Digest, 1935–1937*, Case No. 165.

down in the Extradition Treaty, the person surrendered, although he cannot plead the irregularity in order to oust the jurisdiction of the British courts, may still rely on the principle of speciality embodied in all British extradition treaties as a bar to his prosecution for any crime other than that for which he has been surrendered. But the onus of proving that he has in fact been extradited rests upon the accused.[1] What constitutes *extradition* for the purpose of enabling the accused to rely upon the principle of speciality? It has been held that if the accused himself waives 'the formalities of extradition', i.e. the judicial inquiry which it is provided shall take place in the requested State to decide whether he is liable to surrender under the Treaty, there is no extradition although in fact he may be handed over by the police of the asylum State to the British police.[2] It is submitted that such a view is incorrect, and that a person should be regarded as having been extradited if the authorities of the asylum State in response to a request from another State take the fugitive into custody and deliver him to the police of the requesting State. The fact that this is done outside the provisions of the applicable Extradition Treaty, or that the fugitive foregoes his right to a judicial inquiry before surrender[3] does not take his case outside the operation of the Extradition Act, 1870, section 19, which provides for any case where any person is surrendered in pursuance of an *arrangement* with a foreign State.

[1] *R.* v. *Corrigan*, [1931] 1 K.B. 527; *Annual Digest, 1929–1930*, Case No. 166.

[2] *R.* v. *Corrigan*, [1931] 1 K.B. 527 at 533. Contrast *R.* v. *Flannery* (1923), 3 D.L.R. 689, *Annual Digest, 1919–1920*, Case No. 200 (Supreme Court of Canada—the accused having waived extradition, to convict him of a non-extraditable offence would be a breach of good faith).

In *Re P.*, *Annual Digest, 1923–1924*, Case No. 162 (Austrian Supreme Court as Court of Cassation), under Italo-Austrian extradition agreement P. was to be handed over to the Austrian authorities at a town in Austria by the Italian authorities. In fact the Italian authorities took P. across the Italian frontier and left him in Austria. P. was arrested and tried in Austria for an offence other than that for which his extradition had been requested from the Italian authorities, it being held that there had been no proper extradition and therefore P. could not rely on the speciality provision in the Austro-Italian Treaty. On appeal it was held that the judgment must be quashed. 'It was true that no proper extradition had taken place seeing that he was not handed over to the Austrian authorities. However the essence of extradition is not so much the actual delivery of the accused as the fact that he is actually placed under the jurisdiction of the requesting State. The Italian Government granted the request for extradition as made by the Austrian authorities. The accused was then compulsorily brought back to the Austrian frontier. Accordingly his return to Austria cannot be said to have been voluntary, and he must be regarded as having been extradited.' But cf. *Delivery without Extradition* (*Germany*) case, *Annual Digest, 1919–1922*, Case No. 185 (criminal surrendered without extradition treaty being complied with; absence of regular extradition proceedings held no bar to criminal prosecution for any offence).

[3] The arguments against the fact that an individual has waived certain formalities in his extradition being a reason for depriving him of safeguards incorporated in the Treaty are numerous. One account of then may be found in Hamel's Address to the International Law Association meeting at Madrid in 1913 on 'L'Extradition Volontaire' (see *International Law Association's Twenty-Eighth Report*, pp. 494–506). The motives from which individuals waive such formalities are varied. Thus Oscar Slater waived his extradition from the United States in order the more quickly to clear his name of the crime with which he was charged. He was, none the less, found guilty of a crime of which he was in fact entirely innocent. See Rolph, *Personal Identity* (London, 1957), pp. 103–4.

Conclusions

(i) A British court will probably exercise jurisdiction over a criminal brought before it as the result of a violation of international law. There is, however, no precedent which binds any British court to adopt this view.

(ii) A fugitive criminal seized in violation of international law is not entitled to the protection of section 19 of the Extradition Act, 1870. His remedies include a civil action against the persons who kidnapped him; in some countries he may also have the right to lodge a petition with the European Commission of Human Rights.

(iii) The State whose sovereignty has been violated by an unlawful arrest is entitled to demand the return of the person arrested and the extradition of the kidnappers; it may also have a claim for damages. If a party to the European Convention of Human Rights, it may also be entitled to lodge a complaint with the Commission of Human Rights.

(iv) If a person is seized abroad by private citizens, acting independently of their State, that State is not internationally responsible for their acts.

(v) A person unlawfully seized abroad by private persons may have a civil action against them; he is not, however, entitled to plead the irregularity of his seizure as a bar to criminal or civil proceedings against him, save where a civil action is brought by the kidnappers.

(vi) If one State surrenders a fugitive to another as the result of a mistake not induced by the fraud or deception of the requesting State, the latter is under no obligation to restore the person delivered to it. It may however, as an act of comity, accede to a request for his return.

(vii) An individual surrendered as the result of a mistake cannot set up any irregularity in the asylum State as a bar to proceedings against him. He may be entitled to invoke the principle of speciality.

Finally, in the light of the growing recognition of the need to guarantee the rights of the individual and to provide remedies on the international plane for their violation, it is suggested that extradition treaties should in future provide that States may not exercise jurisdiction over fugitive criminals recovered from the asylum State unless they have been surrendered in accordance with the relevant extradition treaty[1] and that the individual concerned may plead any irregularity in the method of his

[1] *American Journal of International Law*, 29 (1935), Supp., p. 623.

recovery before the courts of the requesting State.[1] In addition it may also be desirable to lay down the conditions under which, if at all, fugitive criminals may waive provisions inserted in such treaties for their benefit.

[1] Cf. Article 26 of the Resolutions of Oxford on Extradition prepared by the Institute of International Law in 1880. For text see *Resolutions of the Institute of International Law* (ed. by Scott, 1916), p. 45; see also p. 111.

THE PLACE OF LAW IN AN INTERNATIONAL ORGANIZATION*

By J. E. S. FAWCETT[1]

I

An attempt will be made here to isolate certain general principles underlying the place of law in an international organization, and to illustrate them in action from the work of the International Monetary Fund; for this purpose sketches of the structure and functions of the Fund will be presented in the course of the discussion in order to facilitate the understanding of those constitutional, operational and administrative problems which arise in its work and of how they are solved.

The Fund has been chosen as exemplar for several reasons. First, its unique structure, its remarkable financial mechanism, and the fact that it has had signal successes, particularly in the last decade, make it intrinsically worthy of study. Like the International Bank for Reconstruction and Development, founded with it, the Fund is unusual among international organizations in earning its own living. Secondly, it is a kind of a central bank and, as with all central banks, its work is both discreet and complicated; because of this and because, for understandable economic reasons, relatively little use was made of the Fund's resources by its members between 1948 and 1956, it has had less attention from publicists, and its activities have come to be less well known and understood than those of other specialized agencies of the United Nations, though some of these agencies have probably less to offer of legal interest than the Fund. Thirdly, the interaction of law and policy is closer and more intense in the Fund than in most international organizations, for it works with its members in a sensitive area, the area of economic policy, where it must strive to have a constructive influence without exceeding its proper jurisdiction. Finally, the writer[1] has had the benefit of some familiarity with the work of the Fund.

II

Certain general principles can be seen as governing the role of law in international organizations. Some are common to all organizations, but they will be discussed here only in the context of the Fund Agreement, first generally and then by illustrations from the work of the Fund. The

* © J. E. S. Fawcett, 1961.

[1] General Counsel of the I.M.F., 1955–60. But such expressions of opinion as there may be here cannot of course be taken as representing opinions or conclusions of the Fund.

principles chosen are: the absence of direct judicial control; the need to interpret the basic instrument of the organization consistently and effectively; and the need to determine the law applicable to the various activities of the organization.

The absence of direct judicial control

It is at first sight a matter of wonder that the specialized agencies of the United Nations should have so tenuous a link with its principal judicial organ. The Fund is among those[1] for which there is no provision in its constituent instrument for resort by member States to the International Court of Justice. The Fund is, however, authorized by its relationship agreement with the United Nations to request advisory opinions of the Court upon any legal question arising within the scope of its activities, other than questions touching its relationship with the United Nations.[2] But the interpretation of the Fund Agreement is a task reserved exclusively to the governing bodies of the Fund.[3] The purpose of this was, in the words of the rapporteur of the Bretton Woods Conference Committee which recommended it, to keep 'disputes, concerning the interpretation of the Agreement between the Fund and any member country within the set-up of the Fund itself, but at the same time to secure for the member in question privileges of fair treatment'.[4]

The 'set-up of the Fund' comprises a Board of Governors, a Board of Executive Directors, a Managing Director and staff. In the Board of Governors, consisting of one Governor—usually the Finance Minister for the time being—and one alternate Governor appointed by each member country, are vested all the powers of the Fund. The Board meets at least once a year and there are also arrangements by which it can take decisions by postal votes.[5] However, it has exercised the right, accorded to it by the Fund Agreement, to delegate all its powers to the Executive Directors, except those powers which are expressly reserved and which include the power 'to decide appeals from interpretations of this Agreement given by the Executive Directors'.[6]

The Executive Directors, of whom normally five are appointed, and thirteen elected, are 'responsible for the conduct of the general operations of the Fund',[7] and they are in technically permanent session at Fund

[1] Compare Universal Postal Union, Article 31; International Communications Union, Article 25 and Annex 4.

[2] See below, p. 328.

[3] Article XVIII; see below, p. 323.

[4] *Proceedings and Documents of the U.N. Monetary and Financial Conference*, vol. 1, p. 248.

[5] Fund By-laws, Section 13. The business of the annual meeting consists largely of debate on the annual report of the Executive Directors, and certain formal supervisory functions.

[6] Article XII, Section 2 (*b*); Fund By-laws, Section 15.

[7] Article XII, Section 3 (*a*).

headquarters in Washington, meeting as often as Fund business requires. The 'general operations' cover two principal fields of work: Fund transactions and the exercise of jurisdiction, under the Fund Agreement, over international payments.[1] The conduct of Fund business by the Executive Directors involves frequent decisions, and interpretations of the Fund Agreement, which are commonly made without resort to the formality of Article XVIII.

Each member country has a quota in the Fund, calculated in United States dollars. The quota forms the basis for the payment of subscriptions, for the determination of drawing rights, for the calculation of Fund holdings of the member's currency, and for the allocation of votes, with which we are immediately concerned. Each member holds 250 votes and one additional vote for each part of its quota equivalent to one hundred thousand U.S. dollars. Since quotas vary enormously in size,[2] it will be seen that a system of weighted voting results. The voting provisions of the Fund Agreement are rather complex, but the main principles are that in the Board of Governors each Governor casts the votes of the member country appointing him; and that in the Executive Board each Director casts the votes as the case may be of the member appointing him or of the member or members electing him. The five members having the largest quotas each appoint a Director; the remaining members elect[3] thirteen Directors between them, so that each of the thirteen is normally elected by several members and he casts all the votes of the members electing him. In no circumstances, either in the Board of Governors or the Executive Board, may votes be split.

It was against this background that Article XVIII was designed. It reads:

'(*a*) Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director, it shall be entitled to representation in accordance with Article XII, section 3 (*j*).

(*b*) In any case where the Executive Directors have given a decision under (*a*) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board the Fund may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.'

Paragraph (*c*) covers the rare case of a member's withdrawal and, it is to be hoped, still remoter case of the Fund being put into liquidation. It provides that any disagreement, arising in these cases, between the Fund

[1] See p. 330 below.

[2] The United States quota is $4,125 billion, and it holds 41,500 votes; the United Kingdom quota is $1,950 billion, with 19,750 votes. Other votes, for example, are France 8,120, Cuba 1,000, Iran 625.

[3] For a term of two years. Directors are eligible for re-election.

and a member shall be submitted to a tribunal of three arbitrators. A slight genuflection is made in the direction of the International Court in the provision that, if the Fund and member, having each appointed an arbitrator, cannot agree on the choice of an umpire, he is to be appointed by the President of the International Court.[1]

Full critical examinations of Article XVIII have been made by two high authorities on the Fund Agreement,[2] but a short explanation of its provisions may be useful here to show to what extent it is a substitute for judicial control.

The first half of the problem, as seen by the rapporteur of the committee which prepared it, was solved by giving to the Executive Directors compulsory and exclusive jurisdiction over any question of interpretation of the Fund Agreement, compulsory in the sense that any question which arises must, at least if a member requests, be submitted to the Executive Directors for decision, and exclusive in the sense that no question may be, at least initially, referred for decision, either by members or by the Executive Board itself, to any other body or tribunal.

The second half of the problem was solved by according to a member country, not entitled to appoint an Executive Director, the right to attend a meeting of the Executive Board and to present its views, on any question submitted under Article XVIII and affecting the member. This provision raises questions about the status of Executive Directors. The sixty-three members, which do not appoint Directors, elect and are represented by thirteen Directors, some of whom represent as many as seven members. What is the character of this representation? In the case of the appointed Directors there is a presumption that they are a class of permanent delegates, subject, at least in important matters, to instructions from the Governments which appointed them. The position is less clear with the elected Directors, some of whom are elected by member countries widely separated not only geographically but in economic interests; Israel, Netherlands and Yugoslavia, and Austria, Belgium and Korea, are two examples of such electoral combinations. Representation in these cases becomes rather attenuated; for, on the assumption that such an elected Director seeks or receives instructions from his Government electors, it is not impossible that he might have to carry conflicting instructions to the Board. In face of this, the hardy opinion has been expressed that the Executive Directors represent, not the members which appointed or elected them, but only the Fund to which lies their sole duty. The truth of the matter is

[1] Fund By-laws, Section 23.

[2] Gold, 'The Interpretation by the I.M.F. of its Articles of Agreement', *International and Comparative Law Quarterly*, 3 (April 1954), p. 256; Hexner, 'Interpretation by International Organisations of their Basic Instruments', *American Journal of International Law*, 53 (1959), p. 341.

perhaps that they represent both; on large issues of economic policy it would be plainly mistaken to think that the Executive Directors would not seek and be given instructions by member countries; again, where a request for use of the Fund's resources was made by a member or where its economic and financial policies were under examination by the Fund, the Executive Director appointed or elected by it would take instructions from its Government and actually represent it in the Board. But here the members appointing Executive Directors have an advantage, for the appointed Director will be closer to his Government, both in the tie of nationality and through professional association (he will often have served in the finance ministry or central bank of his country), than the elected Director in relation to member countries other than his own. To correct the balance, a general provision was made[1] and repeated in Article XVIII (*a*), for a member, not entitled to appoint a Director, to have at its request direct representation in the Board, that is, by its ambassador in Washington or a minister or official attending when some matter particularly affecting the member is under the Board's consideration.

But it must not be overlooked that the Executive Directors also represent the Fund: frequent meetings, relatively infrequent changes of membership, a high level of debate, and a sense of common purpose, have unified the Board, as the arm of the Fund, in a truly impressive feat of international co-operation, which is beginning to have its effect even in the major issues.

It might be supposed from the special right of representation accorded to a member particularly affected by a question of interpretation, and the notion of an 'appeal' to the Board of Governors,[2] that the Executive Board's function under Article XVIII was conceived as essentially judicial. For what the wording of Article XVIII (*a*) and (*b*) suggests is a challenge by a member to a Fund decision affecting it, a disagreement about the meaning or scope of those clauses in the Fund Agreement upon which the Fund has based its decision, and a process in the Executive Board for settling the question, in which the member concerned is in the position of defendant or plaintiff and has therefore a right to be directly represented and heard, and to appeal, if it so wishes, to the Board of Governors against the ruling of the Executive Board.

Not only does a closer examination of Article XVIII show this interpretation to be too narrow, but the practice of the Fund has been clearly against it. In construing Article XVIII it must be kept in mind that particular words and expressions in an international agreement cannot usually bear the same weight of analysis as they can in a statute; differences of language among the draftsmen are alone enough to forbid it. The Fund Agreement is no exception, even though it has a single authentic text in

[1] Article XII, Section 3 (*j*).

[2] Article XII, Section 2 (*b*) (viii).

English; indeed, it is not remarkable for consistency in use of language. This is no criticism of what is a striking intellectual construction, given final form in barely three weeks by the Bretton Woods Conference, in language which, given the large principles and intricate mechanism of the Fund which it has to describe, is seldom ambiguous and always concise. There is no surer demonstration of this than that efforts to elucidate provisions of the Fund Agreement, by paraphrase or by substitution or elaboration of language, in nearly every case end inexorably with the concession that the text expresses the idea of the provision about as well as it can be. Nevertheless, perhaps because of the enforced speed of drafting and because the draftsmen were for the great part working economists rather than legal precisians, there are several instances in the Fund Agreement where the same concepts are given in different contexts slightly different verbal forms; in short, in construing its provisions too much weight cannot be placed on the use of particular words in one place when the idea which they express is cast in a different form in another.

Thus, if we compare Article XVIII (*b*) and Article XII, Section 2 (*b*) (viii), we find in the latter the expression 'appeals from interpretations of this agreement given by the Executive Directors', but in the former that 'the question be referred to the Board of Governors, whose decision shall be final'. Two differences appear: first, an appeal from the interpretation suggests a judicial process, whereas 'reference' has little forensic flavour; secondly, it could be argued that, upon an appeal, the Board of Governors would be limited to affirmation or rejection of the interpretation given, whereas 'reference of the question' brings the whole issue before the Board of Governors *de novo*. These differences are of little importance; but their mere existence forecloses any argument that the process of interpretation is in either Board necessarily judicial.

Secondly, the expression 'any question of interpretation . . . arising between any member and the Fund or between any members of the Fund' in Article XVIII (*a*) has not been itself interpreted restrictively so as to limit the function of interpretation to actual disagreements involving one or more members. The words have been understood, it is believed rightly, to cover any question of interpretation, whether arising on a specific issue or on one of general concern to the Fund and its members, and whether raised by the Managing Director or by a member or in general debate in the Executive Board. Finally, the provision in Article XVIII (*a*) for direct representation of a member concerned is strictly otiose, for that right is already guaranteed in general terms by Article XII, Section 3 (*j*), and its inclusion in Article XVIII adds nothing.

It is thus doubtful whether the language of Article XVIII and its connected clauses can be read as implying that the task of interpretation under

Article XVIII is judicial and that the Executive Board must act in these cases as a court.

But in order to test the efficacy of Article XVIII in the light of this conclusion, we have to see whether it can expose members of the Fund to an abuse or denial of those rights, which judicial control might be expected to protect. How is the possible abuse of power inherent in weighted voting to be avoided, and how is the principle *nemo debet esse judex in re sua* to be observed? For it must be recognized that, because of the great disparity of economic power between members of the Fund institutionalized in weighted voting, a numerical minority of members, possessing advanced economies and, in Papal election parlance, 'great voters', can, at least theoretically, outvote the numerical majority of members on any issue; in particular the position of the countries of North America and western Europe can, in cases where their economic practices and arrangements may be directly under question, and in certain combinations, be unassailable in the parliamentary sense.

These situations are not, of course, confined to the application of Article XVIII; they could arise in any decision of policy by the Executive Directors, whether general or particular. But where the Fund comes to make any interpretation of the Fund Agreement, whether formal or not, which must bind the Fund and its members to certain courses, the issue of the abuse or denial of rights arises in its sharpest form. How the Fund has dealt with this issue will be discussed below; here some further effects of the absence of direct judicial control must be noticed.

First, on mixed issues of law and economic policy it would be a mistake to suppose that the decisions of the Executive Board are arbitrary or capricious, merely because it has, subject to possible reference to the Board of Governors, an exclusive authority even on legal issues: on the contrary, the Executive Board has habitually shown a close regard for the legal arguments on both sides of a controversial question before it, and is probably more careful for the rule of law than many boards of directors, which have only municipal law to contend with, and it is slow to come to a decision until it can be legally well based. In the result the Fund's decisions since it commenced operations in March 1947 show a high degree of coherence and consistency.

Secondly, the absence of direct judicial control creates habits and indeed a state of mind in an organization which militate against the use of the judicial process even when it is available. Though the Fund is authorized to seek advisory opinions from the International Court of Justice, it has, like other specialized agencies, shown no readiness to exercise the right; nor did it present information to the Court[1] in the *U.S. Nationals in*

[1] See Statute, Article 34 (2) and Rules of Court, Article 57 (4).

Morocco case, upon the use and effect of French exchange restrictions, which were subject to the jurisdiction of the Fund, and were brought to the consideration of the Court. But the reticence of the Fund was perhaps vindicated here by the fact that the Court did not find it necessary to pass judgment on, or indeed express any opinion on, the French exchange restrictions. It may well be doubted whether it would be even practicable for the Fund to seek an advisory opinion of the Court. Under Article XVIII, as we have seen, the Executive Directors cannot pass a question of interpretation, raised before them, to any other body or tribunal, and it is their decision which must be given and which, subject to possible review by the Board of Governors, is final. The injection of an advisory opinion of the Court into this process could lead the Fund into a troublesome dilemma. If the Executive Directors, in the course of reaching a decision upon a question of interpretation, were to ask the Court for its opinion, they would, it seems, be bound to refer the whole question: for, since a question of interpretation is essentially a legal question, whatever may be the consequences for policy of its determination,[1] it would be difficult or impossible either for the Fund to sever particular aspects of it for submission to the Court, or for the Court itself to advise upon it without examining and perhaps passing judgment on Fund policies. Since the Fund would have either to disregard the opinion handed down by the Court or to convert it into their own decision under Article XVIII, to take the first course would be to serve the interests neither of the Fund nor the Court, while to take the second would be in effect to substitute for the decision of the Fund that of another body, and of a body which must, by its composition, method of work and range of experience, be less fitted to determine Fund questions than the governing bodies of the Fund itself; and it was plainly so decided at Bretton Woods.

Three conclusions may be drawn from this discussion, one particular to the Fund and the others general.

The first is that the concept of judicial control is incompatible with the design of the Fund, and that even the indirect control which may be had through advisory opinions of the International Court will not work in an organization which has for technical reasons been made the interpreter of its own constitution.

The second is that the absence of judicial control over an international organization may not be necessarily wholly an evil: it can sharpen the sense of international responsibility in those who must make decisions within it, and foster co-operation between countries; for the judicial settlement of disputes, though better than friction and conflict, still falls short of their settlement by countries in consultation on how best they may work together.

[1] Compare the *Competence of General Assembly* (*Admissions*) case, *I.C.J. Reports*, 1950, pp. 6–7.

The third is that the Fund itself has a regulatory function, which cannot usefully be passed on to any outside body.

The interpretation of the Fund Agreement

A key to the interpretation of the Fund Agreement is to be found in Article I, which states that:

'The purposes of the International Monetary Fund are:—

(i) To promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems',

and, after the enumeration of the other main purposes of the Fund, that:

'The Fund shall be guided in all its decisions by the purposes set forth in this Article.'

The whole Article demands attention, for it is not simply a pious preamble but an integral part of the Agreement; and in the interpretation of the Agreement Article I is frequently resorted to as a guide and a support. It is in fact a collection of directive principles, like those to be found in some national constitutions. The very breadth and generality of the purposes and principles set out in Article I entail the presence of some internal inconsistencies; for example, there may be times and situations in which the exchange stability and orderly exchange arrangements, called for by clause (iii), could be too rigid a framework for the expansion and balanced growth of international trade and the development of productive resources called for by clause (ii). It may be that the Fund must in one economic phase of the world stress one purpose and in another phase others; but in the long run the Fund can and should serve them all.

In the interpretation of the Fund Agreement the purposes set out in Article I (i) are the guide; consultation prevails over argument and the search for a common opinion over authoritative pronouncements; resort to formal interpretations under Article XVIII has been made in only nine instances between 1946 and 1960. It is because the work of the Executive Board is largely a process of consultation that possible abuse or denial of rights, discussed above, is avoided. Thus the principle *nemo judex in re sua* is observed through a measure of political restraint by the economically stronger members of the Fund. The problem cannot, of course, arise in the case of the individual member for, since there is not a unanimity rule for the taking of decisions, there is no *liberum veto*;[1] it could, as already suggested, arise where a minority of economically powerful members combined to secure a majority of the votes in the Board, where the

[1] Similar to that considered in the *Treaty of Lausanne* case, discussed by Hexner, loc. cit.

interpretation or application of Fund rules touched their interests. For example when the countries of western Europe undertook in December 1958 to render their currencies externally convertible, and so to enable the non-resident holder of such a currency to purchase any other currency with it freely, for the purpose of making any current payments and approved capital payments, the authorities in each of these countries undertook to maintain a margin of $\frac{3}{4}$ per cent. from parity for exchange between its currency and the U.S. dollar. If the rate threatened to move beyond $\frac{3}{4}$ per cent. above or below parity the authorities would intervene to maintain the rate. This margin was well within the limits prescribed by the Fund Agreement;[1] but, since it was only with the U.S. dollar that margins were to be held, it appeared that, as a curious by-product of this major move towards the 'establishment of a multilateral system of payments',[2] a potential albeit very technical inconsistency with the Fund Agreement was involved in these convertibility arrangements. For it was possible that, where for example sterling was at a premium against the dollar and the French franc was at a discount, the cross-rate between sterling and French francs might by cumulation of the margins reach $1\frac{1}{2}$ per cent. from parity, and in this way the exchange margin of 1 per cent. from parity, permitted by the Fund agreement, would be exceeded and, technically, a multiple rate generated. Though it was known that such a multiple rate would emerge only very rarely and even then its occurrence would be temporary in face of arbitrage, it was a possibility.[3] The Fund Agreement forbids[4] multiple currency practices, which are not either authorized under the Fund Agreement[5] or specifically approved by the Fund. Multiple rates obtain where a currency is being exchanged for other currencies at two or more different rates, it being immaterial whether or not one of these rates is based on parity. Multiple currency practices, taking effect on the payments side of international transactions, serve essentially the same purposes as tariffs, export taxes or subsidies, and import restrictions, on the trade side. But the Fund has recognized that while multiple currency practices are generally restrictive of trade and tend to distort and impair production, they are a readily workable form of control in countries which do not have an elaborate trade administration, and, where such a country's balance of payments has been thought to justify it, the Fund has from time to time approved the temporary use of multiple rates.

[1] Article IV, Section 3 (i) permits an exchange margin of 1 per cent. from parity for spot exchange transactions.

[2] Article I (iv).

[3] For example, if sterling–U.S. dollar parity is \$2.80 = £1 and franc–dollar parity is 4.93 fr. \$1, then franc–sterling parity will be 13.80 fr. = £1, yielding Fund-permitted margins of 13.94–13.66 (all figures approximate). If then sterling moves to \$2.82 = £1 and the franc declines to 4.96 = \$1, thus reaching $\frac{3}{4}$ per cent. margins above and below parity, a sterling holder could buy francs at a cross-rate of 13.98, well in excess of the permitted margin.

[4] Article VIII, Section 3.

[5] Viz. under Article XIV.

It was conceded that in the arrangements for external convertibility the multiple rates which might from time to time emerge did not fall into the class of multiple currency practices authorized under the Fund Agreement; prima facie therefore they required the approval of the Fund. But it could fairly be asked, first, whether these multiple rates would constitute 'multiple currency practices' at all within the meaning of Article VIII, Section 3,[1] since they plainly would not form part of an exchange system in which multiple rates were to be used as instruments of trade policy; and secondly, whether, since these rates would emerge only rarely, as a casual and temporary by-product of external convertibility, the principle *de minimis non curat praetor* should not be applied to them by the Fund. But the opinion prevailed, accepted and indeed urged by the members concerned in the new arrangements, that it would be neither conformable with the standing policy of the Fund on multiple rates nor equitable to the Fund members as a whole for the Fund to turn a blind eye to these potential multiple rates; the Executive Board therefore gave advance approval to them, so that if and when they emerged they would not be inconsistent with the Fund Agreement.

As to the possible inequity in weighted voting, the Executive Board has largely avoided it by rarely voting. In many hundreds of decisions taken over fifteen years, the occasions on which the Executive Board has proceeded to an actual vote number less than a dozen. This is not to minimize the factor of the weighted vote: it is there, and members know it and act accordingly, whether voting takes place or not; but it is a mark of the Executive Board as a place of consultation that the possibility of a negative vote by an Executive Director is a signal not for settlement of the issue by majority vote but for renewed efforts to reach a common opinion.

But consultation does not, as has already been pointed out, exclude law and legal arguments: on the contrary they play a major part, where the interpretation of provisions of the Fund Agreement or its application to unusual cases are in issue, and have often taken the form of extensive and detailed papers prepared by the Legal Department. They may also sometimes assume a tactical role, as when a member country urges a particular construction of the Fund Agreement, in order to vindicate a particular economic policy. In both circumstances the Legal Department has the function of *amicus curiae*, which may sometimes be transposed into one that is quasi-judicial, as where the Executive Board adopts a Legal Department opinion without discussion, or a member country, in disagreement with the Fund over, for example, its liability to pay certain charges, is prepared to accept a ruling of the Legal Department on the issue.

[1] The Executive Board has not adopted, either formally or informally, a precise interpretation of the term: and its meaning has to be constructed from Fund practice.

The familiar problems of interpreting a written constitution as it moves forward through time are not absent in an international organization. In the Fund Agreement, three main factors can be discerned: the contractual basis of its constitution, tending towards rigidity; the principle *ut res magis valeat quam pereat* tending to flexibility and expansion; and the rule of equity between members.

The last factor has already been described. The first factor may be illustrated in two ways. First, amendment of the Fund Agreement is neither politically nor constitutionally easy. A proposal for amendment must in general obtain the votes of three-fifths of the members, having four-fifths of the total voting power, and there are certain provisions which may be amended only by unanimous vote of the members;[1] further, members hesitate to embark on the amendment of important provisions of the Agreement, even though amendment might clarify and modernize them, lest problems that had been the subject of hard-won compromise at Bretton Woods might be reopened and end unresolved. But the Fund is also on its guard against tacit amendment of the Agreement; for example, in the case of the multiple rates associated with external convertibility, discussed above, the question was raised whether advance approval of these rates, given without time limit by the Fund under Article VIII, Section 3, did not constitute an amendment *de facto* of that provision; for, it was suggested, the rule of the Fund forbids multiple currency practices, though they may exceptionally be employed with Fund approval. Though the Fund is not limited, in granting approval, to considerations of the balance of payments of the member concerned, its approval must be in essence temporary, limited to the duration of the circumstances justifying it. The answer, which might be made to this, is that the régime of external convertibility must itself be regarded as temporary, being a major step but still a step towards full multilateralism in international payments; it was hardly necessary therefore to underline the time factor in the decision giving approval to multiple rates. Further, the approval so given remains revocable, if it should appear to the Fund to be no longer justified.

The contractual basis of the constitution of the Fund also leads its interpreters back to the preparatory work, to find, if possible, the expression of intentions not clearly emerging from the text and the origin of provisions known to have been the subjects of compromise. But the theory of the use of preparatory work in treaty interpretation is not satisfactory, nor is the Fund, in particular, well equipped for its application. If the text of an international agreement is clear and unambiguous, the common experience

[1] Relating to withdrawal from membership (Article XV, Section 1); and to rules that no change may be made in a member's quota without its consent (Article III, Section 2) and that no change may be made in the par value of a member's currency except at its request (Article IV, Section 5*b*).

is that the preparatory work will confirm its meaning; if it does not, the interpreter can only conclude that the preparatory work is defective. If the text is ambiguous, it is not clear either why the preparatory work is to be regarded as better evidence of the draftsmen's intentions or what the preparatory work is to be taken to comprise. Is it confined to earlier drafts of the provision in question; or can it include comments by conference delegates or by Governments or, more remotely, statements of policy on the matter by Governments or the legislative history of the agreement in national parliaments, where they have given it, in whole or part, statutory force? There does not appear to be any case in the jurisprudence of the International Court and its predecessor in which the preparatory work has been used otherwise than to confirm the construction of a clear text or to elucidate the meaning of an unclear text by consideration of earlier drafts.

The Bretton Woods Conference kept no official or systematic records of its proceedings, though a number of preliminary drafts of provisions of the Agreement, reports of Conference committees, and summary notes of various debates and proceedings were assembled and published.[1] Further, there are a number of documents, which might be expected to throw light on the intentions of the draftsmen, but which have had either a limited circulation or have not been revealed by Governments at all. The preparatory work is thus incomplete and discontinuous and, though it is the practice always to consult it in the interpretation of the Fund Agreement, this is done *ex abundanti cautela*, for where the text is clear, it serves no more than to confirm its meaning, and where the meaning is doubtful, the preparatory work is generally even more doubtful.

The second factor, *ut res magis valeat quam pereat*, is more fruitful. It operates in many ways, and three examples may be given: the use of implied powers; the supplementation of a *casus omissus*; and the avoidance of precise and limiting definitions. Implied powers were found for the Fund by a formal interpretation under Article XVIII to enable it to raise income for administrative purposes by investment. After a number of years in which drawings from the Fund had been light and therefore the Fund's income from charges on the use of its resources low, it was thought right to raise some income to meet the administrative deficit by investment. The United Nations, the World Bank and certain other organizations had investment programmes of a similar kind. What was proposed for the Fund was that it should sell a relatively small portion of its gold deposits for U.S. dollars, invest the proceeds in U.S. Treasury bills and credit the income received to a reserve fund for the reduction of the deficit. The main

[1] The waters of interpretation are also troubled by those who were delegates at the Bretton Woods Conference and 'remember' what was meant by particular provisions: such an approach to evidence is like that of the judges reported in the Yearbooks as saying to counsel: 'Who are you to say what the statute means when we wrote it?'

question was whether the Agreement forbade such an operation: for Article V, Section 2, provides:

'Except as otherwise provided in this Agreement, operations on the account of the Fund shall be limited to transactions for the purpose of supplying a member, on the initiative of such member, with the currency of another member in exchange for gold or for the currency of the member desiring to make the purchase.'

Against the argument that this section imposed an insuperable bar to the investment proposed, it was pointed out first, that the acknowledged capacity of the Fund to acquire and dispose of immovable and movable property[1] meant that the Fund must be able to engage in transactions other than those contemplated in Article V, Section 3; and secondly, that the Fund, having to incur considerable administrative expenses in the course of its work, must have an implied power, in the interests of good management and the conservation of its resources, to raise income by investment; provided that it used an otherwise uncommitted portion of its resources to do so, that the income was devoted strictly to meeting an actual or potential administrative deficit and that the gold value of the investment was secured by arrangement with the United States.[2]

A significant *casus omissus* was found in the par value system of the Fund. Under this system each member country is required to establish a par value for its currency 'in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944'.[3] A par value shall not be changed except to correct a fundamental disequilibrium and only on the proposal of the member and after consultation with the Fund;[4] and further provision is made for the conditions in which the Fund must or may concur in, or may object to, the proposed change; finally, in the case of an unauthorized change of par value the member shall become ineligible to use the Fund's resources without special determination by the Fund.[5] It is upon the par value that the member's obligation to maintain exchange stability and in particular the 1 per cent. exchange margins[6] already referred to is based. There is no place therefore in the Fund Agreement for the abandonment of a par value without adoption of a new one. It follows that, if a member country allows its exchange rate to fluctuate outside the permitted exchange margins, such a practice is inconsistent with the Fund Agreement, since the member is no longer carrying out the obligations of Article IV, Sections 3 and 4 (*a*). Further, if the rate is a unitary rate, the Fund cannot approve it in the exercise of its jurisdiction over multiple rates. The problem first arose

[1] Article IX, Section 2 (ii).
[2] For text of the formal interpretation see Hexner, loc. cit.
[3] Articles IV, Section 1 (*a*); XX, Section 4 (*a*).
[4] Article IV, Section 5.
[5] Article IV, Section 6.
[6] Article IV, Sections 3 and 4 (*a*).

with the abandonment by Canada of the par value for its dollar in 1950 in face of heavy and continued investment of capital in Canada from the United States. The Fund, recognizing the economic necessity for Canada's action and also the fact that it could not be strictly reconciled with the par value system, filled the gap in the Agreement by imposing certain limitations on such action with a warning of the possible use of sanctions if the action was continued unnecessarily. The Fund said:[1]

'The circumstances that have led the member to conclude that it is unable both to maintain the par value and immediately select a new one can be examined; and if the Fund finds that the arguments of the member are persuasive it may say so, although it cannot give its approval to the action. The Fund would have to emphasise that the withdrawal of support from the par value, or the delay in the proposal of a new par value that could be supported, would have to be temporary, and that it would be essential for the member to remain in close consultation with the Fund respecting exchange arrangements during the interim period and looking toward the early establishment of a par value agreed with the Fund. No other steps would be required so long as the Fund considered the member's case to be persuasive, but at any time that the Fund concluded that the justification for the action of the member was no longer sustainable, it would be the duty of the Fund so to state and to decide whether any action under the Fund Agreement would be necessary or desirable.'[2]

The Fund has more recently tolerated similar fluctuating rates in other member countries, where they were seen to be a step away from multiple currency practices and towards the ultimate unification of rates around a new par value.[3]

Finally, in the Fund's interpretation and application of the Agreement there is a marked avoidance not only of precise definitions of even the major concepts, such as discrimination, multiple currency practices or exchange restrictions, but also of the final resolution of certain disputed questions of interpretation. For example, it is held by some that a member of the Fund is entitled to draw from the Fund automatically if the conditions[4] specified in Article V, Section 3 (*a*) are satisfied. Section 3 (*a*), including the first of the four conditions (the remaining conditions are not material to the argument), reads:

'A member shall be entitled to buy the currency of another member from the Fund in exchange for its own currency subject to the following conditions:

(i) the member desiring to purchase the currency represents that it is presently needed for making in that currency payments which are consistent with the provisions of this Agreement.'

[1] *Annual Report of the I.M.F.*, 1951.

[2] e.g. a declaration that the member was ineligible to use the Fund's resources.

[3] Some authorities, for example Professor James Meade, argue for the general adoption of fluctuating rates in place of the fixed par value system of the Fund.

[4] The conditions may be waived by the Fund in its discretion and on terms which safeguard its interests: Article V, Section 4.

The argument turns in part around the word 'represents': can the Fund challenge or investigate the correctness of the representation? No formal answer has been given to this question. On the one hand, the Fund has not given up the position that the representation may in a proper case be challenged, but, on the other hand, it has in its application of condition (i), as well as in its use of waivers, ridden lightly, so that the automaticist view has not been pressed to a conclusion. An observer might be tempted to see in Fund practice here the influence of common law, rather than civil law, thinking upon the solution of problems of the application of a written instrument.

The nature of the law applicable to the activities of the Fund

The activities of the Fund are governed primarily by the Fund Agreement; but the applicability of other international agreements, general international law, the general principles of law and municipal law have all to be considered.

As a specialized agency of the United Nations the Fund has concluded a relationship agreement with it under Article 63 of the U.N. Charter: it is for the most part an administrative arrangement and raises no legal issues of interest. Apart from provisions for consultation, reciprocal representation and exchange of information with the U.N., the Fund is required to furnish the Security Council and Trusteeship Council with information, and the latter body with technical assistance, upon request;[1] no requests have so far been made.

A more detailed and active responsibility was given to the Fund by the General Agreement on Tariffs and Trade,[2] Article XV of which goes some way towards a delimitation of jurisdiction between the Fund and the Contracting Parties to the G.A.T.T. At the time of the Bretton Woods Conference it was expected that there would be established, parallel with a Fund, an international trade organization. But the Havana Charter, 1948, which laid out the constitution and defined the functions of such an organization, in addition to forming a comprehensive code for international trade practices, failed of acceptance by Governments. The G.A.T.T., which is basically a truncated version of the Havana Charter, embodies much of the code of the Havana Charter, and its Contracting Parties have the duty to work for the elimination of quantitative import restrictions; and five Articles of the G.A.T.T., covering twelve pages of formidable complexity, lay down the principles and methods which are to govern their efforts.[3]

[1] Relationship Agreement, Articles V–VII.

[2] See *G.A.T.T.—Basic Instruments and Selected Documents* (November 1958), vol. 3.

[3] G.A.T.T., Articles XI (general elimination of quantitative restrictions): XII (restrictions to safeguard the balance of payments): XIII (non-discriminatory administration of quantitative restrictions): XIV (exceptions to the rule of non-discrimination): XV (exchange arrangements).

Article XII is of particular concern to the Fund, for it forms an exception to the general rule of elimination of quantitative import restrictions by providing that, on the conditions set out in the Article, 'any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported'; in particular such restrictions must not exceed those necessary:

'(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves'

due regard being had to special factors, such as the existence of external credits or other resources.[1] Further provision was made permitting similar restrictions upon the quantity or value of imports by a country in process of development,[2] 'in order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development'.[3] In both cases the criteria for the imposition of restrictions were plainly within the competence of the Fund. In order to regulate relations between the Fund and the G.A.T.T. Contracting Parties and to delimit, as far as practicable on paper, their fields of jurisdiction, four main principles were laid down:

'i. that the Fund and Contracting Parties should, through systematic consultation, "pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the Contracting Parties";[4]

ii. that "contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intention of the provisions of the Articles of Agreement of the International Monetary Fund";[5]

iii. that any contracting party, which is not a member of the Fund, should enter into a special exchange agreement with the Contracting Parties, to be not more restrictive in exchange matters than the Fund Agreement;[6]

iv. that, in the required consultations with the Fund, "the Contracting Parties shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves, and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the [Fund Agreement] or with the terms of a special exchange agreement between that contracting party and the Contracting Parties".[7] Further, the Fund's determination must be accepted "as to what constitutes a serious

[1] G.A.T.T. Article XII. 2 (*a*).

[2] Defined as 'a contracting party the economy of which can only support low standards of living and is in the early stages of development'. G.A.T.T., Article XVIII. 4 (*a*).

[3] Ibid., para. 9.

[4] G.A.T.T., Article XV. 1, 2, 3 and 5.

[5] Ibid., para. 4.

[6] Ibid., paras. 6–8.

[7] This odd juxtaposition arises because the Contracting Parties (spelt in capitals in the G.A.T.T. when referred to collectively) are not a distinct juridical person. However, they have a secretariat and function largely as an international organization.

decline in the contracting party's monetary reserves, a very low level of its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases." [1]

There are a number of points to be observed in this very interesting essay in co-operation between two international organizations. First, the Fund is not obliged under the terms of G.A.T.T., Article XV, to make the determinations, since it is not a party to the G.A.T.T., but it has given a general undertaking to do so when required, as a step in the consultative procedure. Secondly, the Fund is not called upon to enter the province of the Contracting Parties and to decide whether, in imposing the restrictions under review, the contracting party is in breach of the G.A.T.T.; its function is rather that of expert witness. All the determinations envisaged are either of matters of fact, of mixed fact and economic judgment, or of breaches of the Fund Agreement or the special exchange agreement if the contracting party concerned is not a Fund member. While it is true that the determination of such breaches is a matter of fact and of interpretation of the applicable agreement, it is, as far as the Contracting Parties are concerned, a fact in the sense that it is a conclusive finding.[2] Thirdly, paragraph 4 of the Article is designed to prevent a country from defeating a purpose of the G.A.T.T. to reduce import restrictions by attempting to reach the same end by the use of exchange restrictions, being in this field beyond the jurisdiction of the Contracting Parties, and from defeating the purposes of the Fund Agreement by the use of import restrictions. The second part of the provision is remarkable in that it imposes on Fund members an obligation, implicit, perhaps, but not clearly expressed in the Fund Agreement, which they must perform as contracting parties to the G.A.T.T. But it is only fully effective if and when the membership of the Fund is coextensive with the contracting parties to the G.A.T.T., and when a trade organization was envisaged at the Bretton Woods Conference it was assumed that there would be a common membership of the Fund and the trade organization. But this is not the position between the Fund and the G.A.T.T. Contracting Parties; for there are a number of Fund members who are not parties to the G.A.T.T. and vice versa. This raises a difficult question of jurisdiction: can, for example, the Fund cast its net over import restrictions instituted or intensified by one of its members which is not a contracting party to the G.A.T.T.? Some support for such a step might be found in the clause concerning restrictions on payments maintained as transitional arrangements;[3] for members relying on such transitional arrangements

[1] G.A.T.T., Article XV. 2.

[2] To characterize the Fund here as arbitrator, with all that that implies, exaggerates its function: see Seyid Mohammad, *The Legal Framework of World Trade* (1958), pp. 59–60, where the inferences drawn by the author from Article XV are open to doubt.

[3] Fund Agreement, Article XIV, Section 2.

'shall have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such *commercial*[1] and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability.'

There is a short and, it is believed, conclusive answer to the invocation of this clause in support of the extension of the Fund's jurisdiction over import policies of members which are not contracting parties to the G.A.T.T. It is that, even if it were to be argued that the intention of the draftsmen of the Fund Agreement had been frustrated by the International Trade Organization's failure of acceptance and that Article XIV, Section 2, should be now construed so as to give the Fund a wider jurisdiction over trade than that originally contemplated, such a construction would set up an inadmissible inequity between members, and indeed a contradiction within the interpretation of the Agreement: for it would mean that the clause would have in effect two meanings, and would be construed and applied in a more or a less extended way according as the Fund member concerned was or was not a contracting party to the G.A.T.T.

We can now consider some applications of general international law. There is a presumption that any transaction between the Fund and another international person is governed by public international law, and where the other party is a Fund member it is irrebuttable. There are two main classes of transaction: purchase and sale of currency; and standby arrangements.

While a drawing by a member from the Fund has some of the economic effects of a loan, it is in a strict sense a purchase and sale of currency. The Fund is sole legal owner of the gold and currencies held by it, whether subscribed by members or accruing to it by way of income or conversion. In drawing from the Fund the member purchases, in fixed amounts, one or more currencies of other members out of Fund holdings, and pays to the Fund therefor an equivalent amount of its own currency, calculated at the par of exchange. The contract of sale is completed by the agreement of the Fund to the member's request for the drawing and this consensus is a creature of public international law. But the terms and conditions of the contract are wholly dictated by provisions of the Fund Agreement and Fund By-laws and Regulations and cover such matters as repurchases and payment of charges.

A standby arrangement is not so simple. Here the Fund agrees to sell a specified amount or amounts of currency to a member for equivalent amounts of its currency, at any time over a period of six months or a year without further investigation of the member's representation of need.[2]

[1] Italics mine.

[2] Called for by Article V, Section 3 (*a*) (i) as a condition of a drawing.

But it is usual for the Fund, by way of conditions, to require the member to declare itself committed to certain economic policies, such as fiscal or credit restraints. There are a number of points of interest in these standby arrangements which may be noticed here: first, they are governed wholly by public international law,[1] since they are creations of Fund practice and have no place as such in the Fund Agreement, and there is no doubt that both Fund and members regard them as imposing legal rights and obligations; second, it is in *consideration* of the member's declaration of intent as to its economic policies that the Fund stands ready to sell currency to the member as required; third, the standby arrangements commonly contain a safeguard for the member's carrying out its declared intent in one of two forms: either the member may raise what is in effect an estoppel against itself by undertaking that, if for example prescribed credit ceilings are exceeded during the currency of the standby arrangement, it will not request a drawing from the Fund; or the Fund may reserve for itself the right in the same circumstances to require further consultation between the member and itself before a drawing is made; fourth, Fund transactions are not either in the form of straight drawings or of standby arrangements registered or filed with the United Nations under Article 102 of the Charter. The reasons which suggest themselves for this are that the contract of purchase and sale in the case of a straight drawing is normally wholly executed immediately after completion; and that a standby arrangement, being a financial agreement of a temporary character, does not fall into the class of agreements of which registration is mandatory, though in the absence of an authoritative interpretation of the exact scope of Article 102 this must remain an open question.

Further instances of the application of public international law are to be found on membership issues. The Fund Agreement does not give any clear indication of what political units in the world have capacity for membership. The original members were designated 'countries' which had been represented at the Bretton Woods Conference and accepted the Agreement;[2] membership is open to 'the governments of other countries' on terms prescribed by the Fund.[3] In the body of the Agreement the expressions 'country', 'member country', 'government' are used equivalently. Article XX, Section 2 (*g*) provides that:

> 'By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority, and all territories in respect of which they exercise a mandate.'

[1] For an illuminating but controversial discussion of related questions see Mann, 'Proper Law of Contracts concluded by International Persons', this *Year Book*, 35 (1959), p. 34.

[2] Article II, Section 1.

[3] Article II, Section 2.

This clause has two effects: first, unlike the usual 'colonial application' clause, it does not permit the inclusion or exclusion of particular dependent territories at the discretion of the metropolitan member country: participation of a member's dependent territories is compulsory; second, it does not appear to be possible for colonies or 'overseas territories' to become separate members of the Fund until they have ceased to have that status. The general conclusion from these provisions seems to be that only independent states can be members of the Fund. But if the membership of the Fund is looked at functionally, it can be seen as a union of currency areas: if this conception and that of independent states as members are combined, there is a presumption that each State territory and currency area coincide and that the State controls its currency in that area.

This analysis runs into trouble at two points: first, an overseas territory may constitutionally control the currency in its territory and indeed be capable of performing all the obligations of the Fund Agreement, yet Article XX, Section 2 (*a*) would bar its separate membership, unless the territory came to be recognized as an independent State; second, where the currency circulating in a member's territory serves also as the currency of neighbouring territories under different sovereignty and the control of the currency does not lie solely in the hands of the member but is distributed between all the authorities of the territories in which the currency circulates,[1] it is not easy to see how the member can be free to perform its Fund obligations in respect of the currency. Where the other territories are also under the sovereignty of a member, both members may be looked to by the Fund as responsible for the control of the currency and for satisfying Fund requirements in respect of it. But what if the neighbouring territories are of a non-member of the Fund?

The traditional conception of membership of international organizations of which Article XX, Section 2 (*a*) is a particularly antique example, is in fact breaking down and their practice can be seen to be developing public international law in this field: and the Fund in admitting Guinea and Malaya to membership and in accepting the membership of the United Arab Republic by way of State succession to Egypt and Syria, leaned away from formalism to a functional concept of membership.

The general principles of law will be resorted to in at least two possible ways: for the elucidation of general terms in the Fund Agreement, and as a kind of equity in administering staff regulations.

Since the Fund Agreement is an international instrument, terms such as 'loan', 'net income', 'capital', may not necessarily have the same technical

[1] Examples are the French franc circulating at one time in Guinea and neighbouring territories still members of the French Community when Guinea became independent and a Fund member; and the Malayan dollar circulating in Malaya, Singapore, Brunei and Sarawak.

meaning as would be given to them in English (the only authentic text of the Fund Agreement). They have to be construed therefore through a comparative study of their use in different systems of municipal law, which may uncover similar concepts generally applied.[1] There is a great and yet largely unharvested field of work for comparative lawyers in analysing the concepts used in the practice of international organizations.

The question whether the relationship of a staff member to the international organization which employs him is one of status or of contract or has elements of both, is not easy to answer. The terms of his employment will be determined by his letter of appointment and by staff regulations, and what is certain is that, except in the case of industrial staff locally employed, these terms are not subject in any respect to municipal law. It seems reasonable to regard the staff regulations of an international organization as a special branch of public international law; certainly for those organizations, which participate in the United Nations Administrative Tribunal, a substantial code is being built up. The Fund does not so participate and has no system of administrative appeals: it is therefore necessary, where the rights or obligations of a staff member are in issue, that the terms of his employment be understood in the light of generally accepted principles of administrative law.

The Fund may have to subject itself to the local law for a number of purposes: as an employer of local labour, as a purchaser of goods and services, and as the owner and occupier of its headquarters building: for example, in the case of a substantial contract for the repair or construction of a building, the contractor would be unwilling to conclude it with the Fund without an undertaking that it would waive its immunity from process in the event of a dispute; again the Fund could not practically disregard local zoning regulations and sanitary provisions.

Two broad conclusions may be drawn from this brief survey of the place of law in the International Monetary Fund:

(1) The concept of indirect judicial control of international organizations by the International Court has had little success in practice, and there may be good reasons why it cannot in its present form succeed;

(2) More comparative study is needed of those legal and administrative concepts, which are in use by international organizations and which have analogies or counterparts in municipal systems of law.

[1] See Mann, loc. cit., and also his article, 'A Commercial Law of Nations', this *Year Book*, 33 (1957).

NOTES

THE FIRST CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: *LAWLESS* v. *THE GOVERNMENT OF IRELAND**

THE first case heard by the European Court of Human Rights has raised a number of interesting points which are bound to be of considerable importance for the future of this new international tribunal. The first judgment of the Court, delivered on 14 November 1960, related only to the preliminary objections of the Irish Government on questions of procedure; but these questions are so fundamental to the whole system of international guarantee set up by the European Convention on Human Rights that the decision on the preliminary objections is likely to be as interesting to international lawyers as the later judgment on the merits of the case—which will, in any event, be pronounced too late to be reported in this volume of the *Year Book*.

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950[1], and entered into force on 3 September 1953, when it had been ratified by ten member States.[2] Five others have ratified subsequently,[3] so that all members of the Council of Europe are now Parties, with the exception of France.

By the terms of the Convention, the Contracting Parties guarantee to all persons within their jurisdiction a number of rights and freedoms, including: the right to life; the right to liberty and security of the person; freedom from torture, slavery and servitude; freedom from arbitrary arrest, or detention; the right to a fair trial; freedom from arbitrary interference in private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly and of association; freedom to join trade unions; the right to marry and found a family. These rights and freedoms were taken from the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948 though they are defined in much greater detail. Moreover, they form in the European Convention the object of precise legal obligations, by contrast with the Universal Declaration, which was a solemn statement of intentions—of considerable moral value but without legal effect. By the conclusion of a Protocol on 22 March 1952 three additional rights were added: the right of property, the right of parents to choose the education to be given to their children and the right to free elections.[4]

* © A. H. Robertson, 1961.

[1] *European Treaty Series*, No. 5. The text may also be found in *European Yearbook* (1955), vol. 1, pp. 317–41. The provisions of the Convention are summarized in Robertson, *The Council of Europe—Its Structure, Functions and Achievements* (1956), pp. 146–69. For a history of the negotiations, see Robertson, 'The European Convention on Human Rights', this *Year Book*, 27 (1950), pp. 145–63.

[2] United Kingdom, Norway, Sweden, Federal Republic of Germany, the Saar, Ireland, Greece, Denmark, Iceland and Luxembourg (in the order of deposit of the instruments of ratification).

[3] Turkey (May 1954), Netherlands (August 1954), Belgium (June 1955) Italy (October 1955) and Austria (September 1958). The Saar, however, ceased to be a separate Party to the Convention when it became merged in the Federal Republic of Germany on 1 January 1957.

[4] See Robertson: 'The European Convention on Human Rights—Recent Developments', this *Year Book*, 28 (1951), pp. 359–65. For the text of the Protocol see *European Treaty Series*, No. 9, and *European Yearbook* (1955), vol. 1, pp. 341–3.

In order to ensure respect for the provisions of the Convention, there was first created the European Commission of Human Rights, consisting of a number of members equal to that of the High Contracting Parties. Under Article 24 of the Convention, any contracting Party may refer to the Commission an alleged breach of the Convention by any other Party. This is the classic type of inter-State action, whereby one Government may bring a complaint against another Government for failure to fulfil its obligations under international law. In addition to this, however, there is also a *right of individual petition.* Under Article 25 the Commission may receive petitions from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention'. This jurisdiction is, however, subject to two conditions: that the Party against which the complaint is made has declared that it recognizes the right of individual petition and that at least five other States have made similar declarations. In fact, ten out of the fifteen members of the Council of Europe have recognized the competence of the Commission to receive individual petitions,[1] and this remedy is now available to nearly 100 million Europeans. A condition of its exercise is the previous exhaustion of local remedies and many applications from individuals have been rejected for non-compliance with this rule. Important cases which have been examined by the Commission are those relating to the dissolution of the German Communist Party and the two cases brought by Greece against the United Kingdom in respect of the emergency measures in Cyprus.[2]

One function of the Commission, under Article 28, is 'to place itself at the disposal of the parties with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention'. Failing such a settlement, it is required 'to draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention' (Article 31). This report is to be transmitted to the Committee of Ministers of the Council of Europe, which is required to decide by a two-thirds majority whether there has been a violation of the Convention and, if so, what measures should be taken to remedy the situation, unless the matter is referred to the Court within a period of three months. The Parties undertake to regard as binding on them any decision of the Committee of Ministers (Article 32).

The Committee, consisting as it does of the ministers for foreign affairs of the member States, is essentially a political organ better qualified to take decisions on political than legal grounds. It may well be the most appropriate body for deciding certain types of case. On the other hand, the question whether a Contracting Party has violated the provisions of the Convention is often likely to be a legal question more suitable for determination by a judicial authority. It was for this reason that the Convention also provided for the creation of the European Court of Human Rights.

The Court is composed of a number of judges equal to the number of members of the Council of Europe, that is to say fifteen; but for the consideration of any case, the Court is to consist only of a Chamber of seven judges. The High Contracting Parties and the Commission alone have the right to bring a case before the Court; and this may only be done within a period of three months from the date of the transmission of

[1] Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway and Sweden.

[2] Information about the work of the Commission may be found in *European Commission of Human Rights: Documents and Decisions, 1955–1957* (The Hague, 1959); *Yearbook of the European Commission of Human Rights, 1958–1959* (The Hague, 1960); and in an address by Waldock, President of the Commission, published in this *Year Book*, 34 (1958), pp. 356–63.

the Report to the Committee of Ministers. The Court, moreover, may only entertain cases brought against a High Contracting Party which has declared that it recognizes the jurisdiction of the Court as compulsory or which has agreed to submit to the jurisdiction in the particular case.[1]

It will be observed that, as the result of these provisions, an individual applicant may bring a petition against his own Government before the Commission but that he cannot refer the matter to the Court. Only the Government or the Commission can do so. If the Commission does refer the matter to the Court, what is then the position of the individual applicant? By the terms of the Convention he has no *locus standi* before the Court as a petitioner; on the other hand, he is the real party in interest and elementary principles of justice require that his case should be heard as well as that of the Government against which he has brought his petition. How should this be done? It was this problem which lay at the heart of the preliminary objections in the *Lawless* case; and it is because the solutions found on that occasion are likely to be precedents for all future cases in which the Commission refers an individual petition to the Court that this case is of particular importance in the history of the international protection of human rights.

The facts of the case

Gerard Richard Lawless was arrested by agents of the Government of Ireland on 11 July 1957 and was detained without trial in a military detention camp (the Curragh) between 13 July and 11 December 1957 in pursuance of an Order made by the Minister of Justice under Section 4 of the Offences Against the State (Amendment) Act, 1940. This Act empowered the Government to arrest and detain persons without trial when it considered that the exercise of such powers was necessary to preserve peace and public order and after it had made a proclamation to that effect. Such a proclamation had been made on 5 July 1957 after a series of incidents disturbing the peace; and it was in accordance with the powers thus conferred on the Government that Lawless was arrested as being a suspected member of an illegal organization, namely, the Irish Republican Army.

On 8 September 1957 Lawless exercised the right conferred upon him by Section 8 of the 1940 Act to apply to have the continuation of his detention considered by the Detention Commission which had been set up by the Government in accordance with the Act, and appeared before that Commission on 17 September 1957 assisted by a solicitor and counsel. The following day, however, he also took habeas corpus proceedings in the High Court under Article 40 of the Irish Constitution to test the legality of his detention under the relevant provisions of the Constitution and of Irish law. The Detention Commission thereupon adjourned its proceedings under the 1940 Act pending the outcome of the habeas corpus proceedings in the ordinary courts.

In the High Court the Commandant of the military prison camp where Lawless was detained opposed the motion for an habeas corpus order, relying upon the order for his detention made by the Minister for Justice under the 1940 Act. The High Court delivered judgment on 11 October 1957 upholding the cause of detention shown by the Commandant and rejecting the application for habeas corpus.

[1] The following parties have recognized the compulsory jurisdiction of the Court: Belgium, Denmark, Federal Republic of Germany, Ireland, the Netherlands, Luxembourg, Austria, Iceland. For an account of the structure, competence and procedure of the Court, see Robertson: 'The European Court of Human Rights', *American Journal of Comparative Law*, 9 (1960), pp. 1–28.

On 14 October 1957 Lawless appealed to the Supreme Court, invoking not only the Constitution and laws of the Republic but also the provisions of the European Convention of Human Rights. The Supreme Court dismissed the appeal on 6 November 1957, and on 3 December 1957 delivered a reasoned judgment stating the grounds for its dismissal of the appeal, pointing out that (*a*) the constitutional validity of the Offences Against the State (Amendment) Act, 1940, was not open to question, and (*b*) the European Convention of Human Rights did not form part of the municipal law of the Irish Republic.

Meanwhile, on 8 November 1957—that is, two days after the announcement of the Supreme Court's rejection of his appeal—Lawless transmitted an application to the European Commission of Human Rights. In the application he alleged that his arrest and detention under the 1940 Act without charge or trial violated the Convention and claimed:

(*a*) immediate release from detention;
(*b*) payment of compensation and damages for his detention; and
(*c*) payment of all the costs and expenses of and incidental to the proceedings in the Irish courts and before the Commission to secure his release.

Shortly afterwards, the Detention Commission resumed its consideration of the case under Section 8 of the 1940 Act and held hearings for that purpose on 6 and 10 December 1957. On the latter date, at the invitation of the Attorney-General, Lawless in person before the Detention Commission gave a verbal undertaking that he would not 'engage in any illegal activities under the Offences Against the State Acts, 1939 and 1940', and on the following day an Order was made by the Minister for Justice, under Section 6 of the 1940 Act, releasing him from detention.

This was notified to the European Commission of Human Rights by his solicitor in a letter dated 16 December 1957. The letter at the same time stated that he intended to continue the proceedings before the Commission with regard to (*a*) the claim to compensation and damages for his detention, and (*b*) the claim to be reimbursed all costs and expenses in connexion with the proceedings undertaken to obtain his release.

The proceedings before the Commission

Under Article 33 of the Convention, the Commission meets *in camera*. Article 31 also provides that, in the event of failure of the attempts at friendly settlement (which occurred in this case) the Commission's report shall be transmitted to the Committee of Ministers, whose proceedings and documents are confidential; the report shall also be transmitted to the State concerned, which shall not be at liberty to publish it. The report of the Commission is not, therefore, a public document and has not been available for the preparation of this Note. The proceedings of the Court, on the other hand, are public and together with the communiqués issued to the Press by the Council of Europe are the source of the information contained herein.

The whole basis for the application to the Commission was that the arrest and detention of Lawless were in contravention of Article 5 of the Convention of Human Rights, which provides that everyone has the right to liberty and security of person and that no one shall be deprived of his liberty save in certain circumstances which are specifically set out, such as lawful detention after conviction by a competent court. The Commission of Human Rights was unanimous in holding that arrest and detention without trial under the 1940 Act were not in accordance with Article 5 of the Convention.

Article 15 of the Convention, however, provides as follows:

'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

Moreover, any Party availing itself of this right of derogation is required to inform the Secretary-General of the Council of Europe of the measures taken and the reasons therefor. The Government had in fact informed the Secretary-General of the measures taken in a letter of 20 July 1957; the Commission, while of opinion that this letter did not indicate with sufficient clearness the reasons for the derogation, nevertheless accepted this letter as complying with the requirements of Article 15.

The crucial question, therefore, was whether or not at the relevant dates there existed 'a public emergency threatening the life of the nation' within the meaning of Article 15. Now it might be argued that this was a question of fact which could only be determined, in the light of all the facts, by the Government of the State concerned, to which alone all the facts would be known. This view, however, had already been rejected by the Commission when considering the *Cyprus* case, brought by Greece against the United Kingdom in 1956. The Commission had then taken the view that:

'(*a*) the Commission always has the competence and the duty under Article 15 to examine and pronounce upon a Government's determination of the existence of a public emergency threatening the life of the nation for the purpose of that Article; but

'(*b*) some discretion and some margin of appreciation must be allowed to a Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.'

This position of principle was endorsed in the *Lawless* case. The Commission then concluded, by a majority of 9 votes to 5, that 'in making a determination on 5th July 1957 that there existed in the Republic of Ireland a public emergency threatening the life of the nation, the Respondent Government did not go beyond the proper margin of discretion allowed to it under Article 15, paragraph (1)'. This decision then led to consideration of the further question: whether the arrest and detention of persons without trial was a measure 'strictly required by the exigencies of the situation'. This question the Commission also answered in the affirmative, by a majority of 8 votes to 6, so that the conclusion of the Commission on the issue as a whole was that the facts found did not disclose a breach of the Convention by the Irish Government. The report of the Commission to this effect was transmitted to the Committee of Ministers of the Council of Europe on 1 February 1960.

Having reached this conclusion, the Commission then had to decide whether to limit itself to the transmission of its report to the Committee of Ministers, or whether to refer the matter to the Court. On 1 April 1960 it decided on the latter course on the ground that the Lawless application raised issues which were of fundamental importance in the application of the Convention. The Commission pointed out that it had been divided, with a substantial minority vote, on two questions arising under Article 15; it had therefore decided to refer the case to the Court for an authoritative decision. At the same time, the Commission pointed out that its decision to refer the case to the Court was not to be understood as qualifying in any way its opinion that the facts found did not disclose any breach by the Irish Government of its obligations under the

Convention. On the contrary, the Commission asked the Court to confirm the opinions expressed by the Commission on the various matters dealt with in its Report and to find that no breach of the Convention by the Government had been established.

The procedural problem

The reference of the case by the Commission to the Court raised for the first time the problem of the role of the Commission in such circumstances. Was the Commission to appear as a party to the proceedings before the Court? If so, was the Commission to act as the advocate of the individual applicant, since he himself could not be heard though justice required that his case should be stated? Was the Court to re-examine all the facts of the case or would it accept the findings of the Commission? Was the Commission authorized to transmit to the Court its report, which had been drawn up for the Committee of Ministers, when there was no provision to that effect in the Convention and this was bound to have the result of destroying, in whole or in part, its confidential character? If the Commission was not to act as the advocate of the applicant, how, if at all, was his point of view to be brought to the Court's attention?

To deal with the simpler problems first, that of transmission of the Commission's report to the Court was settled quite simply on a basis of common sense. It would obviously facilitate the proceedings that the report should be available to the Court and the latter clearly expected it, since paragraph 2 of Rule 29 of the Rules of Court reads as follows:

'The Court shall, whether a case is referred to it by a Contracting Party or by the Commission, take into consideration the report of the latter.'

The Commission thus transmitted its report to the Court and the correctness of this procedure has never been questioned.

As regards the right of the Commission to take part in the proceedings before the Court, the latter evidently considered this question when drawing up its rules. Paragraph 1 of Rule 29 reads as follows:

'The Commission shall delegate one or more of its members to take part in the consideration of a case before the Court. The delegates may, if they so desire, have the assistance of any person of their choice.'

Rule 21 of the Commission's Rules of Procedure contains a corresponding provision. In accordance with these texts, then, the Commission, when referring the *Lawless* case to the Court on 12 April 1960, appointed Waldock, its President, as its principal delegate and Eustathiades and Petren as assistant delegates. The nature of their role before the Court was thus described by Professor Waldock in his opening address:

'The fact that in every case the Commission has to conduct an objective and impartial investigation into the facts and the law, and has confidentially to place itself at the disposal of the Parties for the purpose of seeking a friendly settlement of the case, makes it impossible for the Commission, when the case comes before the Court, to depart from its objectivity and impartiality, and impossible for it to identify itself either with the Government or with the individual.

'This is not to say, Mr. President, that being objective and impartial is inconsistent with the Commission's having to express its opinion on the case. On the contrary, the Convention requires the Commission to state its opinion in its Report, and in the present case the Commission has given its opinion. But for the Commission to express its opinion on a case is one thing, and for it to take up the case of one side and to contend for the success of that case before the Court is quite another thing.'

It is thus clearly established that the Commission does not consider that it should discharge the role of advocate for the individual applicant in the proceedings before the Court. The problem how the individual's case is to be presented to the Court thus still subsists.

It is clear, however, that the Commission has considered this problem. On 30 March 1960 the Commission adopted a new Rule 76 of its Rules of Procedure, reading as follows:

'When a case brought before the Commission in pursuance of Article 25 of the Convention is subsequently referred to the Court, the Secretary of the Commission shall immediately notify the Applicant. Unless the Commission shall otherwise decide, the Secretary shall also in due course communicate to him the Commission's Report, informing him that he may, within a time limit fixed by the President, submit to the Commission his written observations on the said Report. The Commission shall decide what action, if any, shall be taken in respect of these observations.'

In accordance with this provision, the Commission transmitted its report to the individual applicant on 13 April 1960—that is, after referring the case to the Court—and invited him to submit his observations to the Commission. At the same time, the Commission pointed out that the document must be kept secret and that the applicant was not entitled to publish it. The first objection made by the Government of Ireland to the procedure in the case related to this publication of the report.[1]

The publication of the report

The Government's argument may be summarized as follows. The Convention (as mentioned above) provides in its Article 31 that the Commission's report shall be transmitted to the Committee of Ministers and to the Governments concerned, which shall not be at liberty to publish it. It is therefore clearly the intention that the report shall be kept secret and not open to publication; and the absence of any provision in the Convention authorizing its transmission to an individual is no mere accident. Furthermore, it was argued, the Government continued to be bound by the obligation of secrecy even after the case had been referred to the Court; it was inconceivable that a State should be in a position of inferiority to the Commission as regards the obligation of secrecy. In the course of the oral hearings, the Attorney-General of Ireland even disclosed that the Government had asked the Committee of Ministers to publish the Commission's conclusion that no violation of the Convention had occurred, but this request was refused. Since the Commission had no means of compelling the applicant to respect the obligation of secrecy, this meant that the Government was even in a position of inferiority by comparison with him. The Government therefore asked the Court to hold that the publication of the report by the Commission was in contravention of the Convention and that Rule 76 was *ultra vires*.

The Commission's point of view on this preliminary objection was to recognize that Article 31 of the Convention imposed an obligation of secrecy as regards the publication of the report but to maintain that this was limited in two respects. First, it related to publication to the Press or to third parties but not to communication to a party to the

[1] The Irish Government also objected to the jurisdiction on the ground that the Commission had adopted its report on 19 December 1959, but only transmitted it to the Committee of Ministers and the Government on 1 February 1960. This meant that the decision to refer the case to the Court, taken on 1 April 1960, was within three months of the date of actual transmission of the report but not within three months of the date at which the report should, in the Government's view, have been transmitted. This objection was, however, withdrawn during the course of the oral hearings.

proceedings; 'obvious considerations of equity militate in favour of a party to the proceedings before the Commission being informed of the Commission's conclusions concerning his own case'. Secondly, the obligation to secrecy, it was argued, related to the Commission's report once it had been transmitted to the Committee of Ministers and *while the case was pending before the Committee of Ministers*. The report should then be kept secret in order to make possible a last attempt at conciliation, in confidential discussions, before the Committee of Ministers was called on to decide whether a breach had occurred. The President of the Commission was able to quote from the *travaux préparatoires* to show that this was the intention of the authors of the Convention in inserting the stipulation of secrecy. However, once the matter was referred to the Court of Human Rights the provisions of secrecy which relate to the proceedings before the Committee of Ministers would no longer apply and the problem should then be viewed in quite a new light, as the proceedings before the Court are public. It is to be observed, moreover, that the Commission's Rule 76 only provides for communication of the report to the individual applicant *after* the case has been referred to the Court. At that stage, the President of the Commission stated, the Commission considers that 'it is free, if it thinks fit, to publish or to communicate to any person the contents of its report in connection with proceedings before the Court'.

The role of the individual in the proceedings before the Court

In accordance with its Rule 76 the Commission not only communicated the report to the individual applicant but also invited his written observations thereon. This was done with a view to transmitting them, if thought appropriate, in due course to the Court. This was the way in which the Commission sought to make it possible for the individual's point of view to be communicated to the Court even though he had no *locus standi* as a party to the proceedings. In its Memorial, the Commission specifically asked the Court:

(1) to give leave for the Commission to submit to the Court the Applicant's comments on the Commission's Report as one of the Commission's documents in the case; and

(2) in general, to give directions as to the right of the Commission to communicate to the Court the comments of the Applicant in regard to matters arising in the proceedings.

The Government took strong exception to this procedure. It pointed out that in the course of the *travaux préparatoires*, the Committee of Senior Officials which undertook the final drafting of the Convention had 'thought it necessary to point out clearly that only the High Contracting Parties and the Commission and not private individuals shall have the right to bring a case before the Court'. This, indeed, is stated *expressis verbis* in Article 44 of the Convention. The Government's Counter-Memorial continued:

'The Commission in its present Memorial recognises this as being the position, but it attempts by a subterfuge to bestow on the individual the quality of a party before the Court, by enabling the individual to make submissions to the Court in the form of a document which the Commission wishes to annex to its Memorial, and further by seeking directions as to the communication to the Court of the comments of the Applicant in regard to matters arising in the present proceedings. If this were permitted the Applicant would be enabled to play an active part in the proceedings before the Court in much the same way as if he were a party.

'The Commission is in this way attempting to modify the Convention by an oblique procedure and without the approval of the High Contracting Parties who are the authors of the Convention.

The President of the Commission, however, adduced during the oral hearings some powerful arguments in support of the latter's position. He pointed out, in the first place, that the Convention was quite silent as to the position of the individual in the proceedings before the Court but that the Commission 'found it difficult to attribute to the authors of the Convention an intention to place an impenetrable curtain between the individual and an organ specifically set up as a judicial tribunal to make a judicial determination of his case'. The Commission agreed with the Government that Article 44 of the Convention clearly prevented an individual from appearing before the Court as a party to the proceedings, but it could not accept that this article was intended to prevent him from having any contact at all with the proceedings before the Court. The individual and the Government were on a footing of equality before the Commission; the Commission's report was a new factor in the case now before the Court; the Government would have every opportunity of challenging the contents of this report in the proceedings before the Court; the individual must be given, by some means or other, a similar opportunity.

In support of this view the President of the Commission cited the Opinion of the International Court of Justice in the case of the judgments of the Administrative Tribunal of the International Labour Organization.[1] This concerned an appeal by U.N.E.S.C.O. to the International Court against judgments of the Administrative Tribunal in favour of four individuals; under Article 66 of the Statute of the Court only States and international organizations have access to the Court; the latter nevertheless held that:

'the judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their argument to the Court'.

and arrangements were made that U.N.E.S.C.O. would transmit to the Court the observations in writing of the individuals concerned. In replying to this point, however, the Irish Attorney-General distinguished the U.N.E.S.C.O. case on the ground that the procedure then followed was adopted after discussion, and by agreement with the organization; in the present case he objected to the action of the Commission, which had been taken without consulting, and contrary to the wishes of, the Irish Government. He recognized that the acceptance of his view would place the individual in a certain position of inequality, but he thought this was 'more fanciful than real', and continued:

'The inequality, such as it is, is, in my submission, deliberate, not in the sense of States wishing to place individual citizens at a disadvantage, but because in agreeing to the limited, I concede very limited, jurisdiction of the Court created by the Convention, States went as far as it appeared to them that they would be warranted in doing at present in recognising, for individuals, a status of any kind in international law.'

The Commission had also noticed that the Court itself had not apparently intended to shut itself off from any contact with the individual applicant. Rule 29 of the Rules of Court provides that the delegates of the Commission in the proceedings before the Court 'may, if they so desire, have the assistance of any person of their choice'; this certainly seemed to authorize the delegates to refer to the applicant himself, if they

[1] *I.C.J. Reports*, 1956, p. 57, at p. 86.

wished. The Commission therefore sought the directions of the Court as to the way in which the applicant's comments on the Commission's report or on any new points arising in the course of the proceedings should be brought to the Court's attention. In conclusion, the President of the Commission pointed out that, in raising this point, the Commission was thinking not only of the particular individual whose case was under examination but of all the individuals whose cases might come before the Court for final decision in the years to come.

The formulation of the issues submitted to the Court

The last of the preliminary objections of the Irish Government related to the manner in which the Commission, in its Memorial, had formulated the issues submitted to the Court. The Commission had, in its Memorial, asked the Court to confirm its view that no breach of the Convention had occurred; nevertheless, in its formal submission to the Court it had phrased the question in the interrogative form and had asked the Court to decide 'whether or not' the Government was guilty of a breach of its obligations under the Convention and, if so, what compensation, if any, was due to the applicant. Having already reached the conclusion, as stated in its own Report, that the Government was not in breach of its obligations, the Commission was bound, in the Government's view, to stand by and defend its own conclusions. It was therefore not correct that it should pose a series of questions to the Court, as if the issues were quite open: the most it should have done was to seek the Court's confirmation of its own conclusions. The way in which the Commission had presented the case to the Court showed that 'its concern is to secure from the Court confirmation of its Opinions not in relation to the individual applicant named in this case, but in relation to the rights of all individuals. . . .' This in turn almost amounted to a request for an advisory opinion, for which no provision exists in the Convention.[1] In reply, the President of the Commission pointed out that the object of the Commission had been to present to the Court all possible material on which to base its judgment and that it was only by a majority of 8 votes to 6 that the Commission had reached a decision in favour of the Government. The most objective way of formulating the issue was thus in the simple interrogative form. But this did not amount to a request for an advisory opinion because the Court was now clearly called on to pronounce judgment under Articles 50 to 54 of the Convention.

In effect, the Attorney-General of Ireland did not press this objection during the course of the oral hearings and it was not included in the Government's final submissions to the Court (quoted below). The Court did not, therefore, pronounce on this point.

In conclusion of the oral hearings, the Government asked the Court:

(1) To declare that any publication by the Commission of its report, other than that expressly authorized by the Convention, is a breach of the obligations imposed on the Commission by the Convention.
(2) To rule that the comments of the applicant on the report of the Commission be not received by the Court.
(3) To rule that no further comments of the applicant on matters arising in the present proceedings may be received by the Court.
(4) To declare that a correct interpretation of the Convention does not permit of action of the nature contemplated by Rule 76 of the Rules of the Commission.

[1] The Consultative Assembly of the Council of Europe has proposed that a protocol should be concluded, conferring on the Court the competence to give advisory opinions—Recommendation 232 of 22 January 1960.

The Commission had asked the Court to reject the Government's objections as regards the publication of the report to the applicant and as regards the formulation of the issue for the decision of the Court; it then asked for leave to transmit to the Court the written comments of the applicant on the Commission's report and for directions as to the right of the Commission to communicate the applicant's comments on any further matters arising in the course of the proceedings.

The oral hearings took place on 3 and 4 October 1960, and the Court delivered its judgment on the preliminary objections and questions of procedure on 14 November.[1]

After reciting the facts of the case and the history of the proceedings, it considered first of all the question: 'Is Rule 76 of the Rules of Procedure of the Commission in general contrary to the terms of the Convention?' The Court was here rather cautious as to its own competence in the matter. It pointed out that the Commission and the Court were independent organs set up by the Convention, each with its own functions and responsibilities; and that the Court had no general power to interpret the Convention in an abstract manner but only to decide particular cases referred to it in accordance with Article 45 and 47. From these considerations it concluded that:

'the Court is not competent to take decisions such as that to delete a rule from the Commission's Rules of Procedure—a step which would affect all Parties to the Convention—since this would amount to having power to make rulings on matters of procedure or to render advisory opinions; that accordingly the Court has no power to consider the point raised in a general manner by the Commission and the Irish Government'.

The Court then turned from the general to the particular, namely, to the communication of the Commission's Report in this case to Lawless. It recognized the need for secrecy in the proceedings before the Commission and the Committee of Ministers; but it reaffirmed the public character of the hearings before the Court. After pointing out that this public character attached only to the oral proceedings and the judgment, but not to the documents in the case (except when authorized by the Court), it went on to distinguish between publication in general and communication to the person directly concerned subject to injunctions of secrecy. This distinction led to the conclusion that:

'the Court is of the opinion that the Commission is enabled under the Convention to communicate to the Applicant, with the proviso that it must not be published, the whole or part of its Report or a summary thereof, whenever such communication seems appropriate; therefore, in the present case, the Commission, in communicating its Report to G. R. Lawless, the Applicant, did not exceed its powers'.

Finally, the Court considered the Commission's request for leave to communicate to the Court the applicant's observations on its own report and on other points which might arise during the proceedings. After reviewing the arguments on both sides, it drew attention to the fact that 'it is in the interests of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration, the applicant's point of view'. It went on to point out that there already existed three ways in which this could be done: in the Commission's report, in the statements of the delegates of the Commission before the Court and by hearing the applicant as a witness. Its conclusion, then, was that having been unable as yet to examine the merits of the case, it was not in a position to reach a decision on the Commission's request and reserved its right to do so at a later date.

[1] The judges constituting the Chamber which heard this case were: Cassin (President), and Maridakis, Rodenbourg, McGonigal (*ex officio* member), Balladore Pallieri, Arnalds, Arik.

The Court accordingly, by 6 votes to 1,[1] rejected the first, third and fourth of the Government's objections in their final submissions, declared that 'at this stage there is no reason to authorise the Commission to transmit to it the applicant's written observations on the Commission's report', and decided unanimously to proceed to the examination of the merits of the case.

This first decision of the European Court of Human Rights is bound to have important consequences for the future, not only in relation to the *Lawless* case but also, as stated by the President of the Commission, as a precedent for all future cases brought before the Commission by individual applicants and subsequently referred to the Court.

While the Court considered that it was outside its competence to give a ruling on the general question whether ~~Article~~ 76 of the Commission's Rules of Procedure was in conformity with the Convention, it implicitly validated the rule, since the rule exists and is applied and the only body that could conceivably have invalidated it has declined to do so. Moreover, the Court held that, in this particular case, the communication of the report to Mr. Lawless, with the proviso that he should not publish it, was in order; this would therefore seem to be a clear precedent for the future.

The communication to the applicant, however, was only a first step. The main point of such communication is to permit the applicant to submit his observations on the report to the Commission and to enable the latter, if it considers appropriate, to forward them to the Court. It is the legality of this procedure which is the more important issue. On this point, the Court postponed its decision on the Commission's request for authorization to submit a memorandum containing the applicant's observations, but it did state that 'it is in the interests of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration, the applicant's point of view'; moreover, the Court continued, it has at its disposal for this purpose

'. . . the written and oral observations of the delegates and counsel of the Commission which, as the defender of the public interest, *is entitled of its own accord to make known the applicant's views to the Court*, even if it does not share them, as a means of throwing light on the points at issue'.

Here, as stated by the Attorney-General of Ireland, the fundamental issue is how far States have gone, by signing the Convention, 'in recognising, for individuals, a status of any kind in international law'. There is no doubt that the ten States which have accepted the optional provisions of Article 25 have recognized the right of the individual to petition the Commission; the Court has now decided that, once this has been done, the individual can receive the Commission's report; it has gone a long way towards agreeing to receive the individual's comments and take account of them during its proceedings. This will constitute a big step forward in establishing the status of the individual in international law.

A. H. ROBERTSON

THE EUROPEAN FREE TRADE ASSOCIATION*

THE Convention establishing the European Free Trade Association,[2] which entered into force on 3 May 1960, marked the end of a stage in the history of economic co-operation in Europe. Within the Organization for European Economic Co-operation, negotiations had taken place for many months for the establishment of an association

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[1] A dissenting judgment was delivered by Judge Maridakis, who accepted the Government's view that Rule 76 of the Commission's Rules of Procedure was inconsistent with the provision of the Convention.

[2] *Treaty Series*, No. 30 (1960), Cmnd. 1026.

between the Customs Union formed by Belgium, the Federal Republic of Germany, France, Holland, Italy and Luxembourg, and the other members of the Organization for European Economic Co-operation. In December 1958, however, it became apparent that the negotiations had no prospect of success; as a result, in July 1959, officials from seven countries, Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom met at Stockholm to discuss the establishment of arrangements between their countries, constituting a free-trade area; these arrangements finally culminated in the Convention, approved at Stockholm in November 1959, which is discussed in this Note.

For the readers of this *Year Book* it seems best to touch only briefly on the substantive rules which affect trade and to concentrate rather on the provisions which show most clearly the character of the Association and its institutions. General observations may then be kept to the end. It is also only possible to comment on the arrangements provided for in the Convention; one cannot say anything of other forms of co-operation which may subsequently be created between the seven countries of the Association, either outside this Convention or by amendment of its terms.

The primary purpose of the Stockholm Convention is to eliminate the major barriers to trade. Customs duties on industrial goods passing from one member to another are to be eliminated by successive stages ending in 1970, and the protective element in revenue duties and internal taxation is also to be eliminated either in these stages or, as the United Kingdom proposes, at one stroke before 1 June 1965. It is the mark of a free-trade area as distinct from a customs union that the tariffs charged by the various members on goods from outside the area may be at different levels. Rules of origin have therefore to be introduced in order to make sure that goods have undergone a substantial process of production in a member State, and have thus genuinely entered into the economic life of the area, if they are to claim the benefit of free entry into the territory of another member. Quantitative restrictions are to be abolished within the area; first, quotas are to be established and made available to all member states, and then the quotas are to be enlarged steadily in such a way that there will be no restriction of trade at the end of the process. There are also articles abolishing duties and quantitative restrictions on exports, and provisions concerning the question of drawback and deflexions of trade and dealing with exceptions and special problems, both in the field of tariffs and of quantitative restrictions.

The rules for the elimination of the primary barriers of trade are the kernel of the Convention, as they must be of any agreement to establish a free-trade area. But the freer competition which should follow directly from that elimination can be hampered by measures in other fields. For instance, where a commodity is controlled by a State monopoly or a private monopoly, the trading policies and decisions of the monopoly can have the same effects as customs duties or quantitative restrictions; therefore, Articles 13–16 have been included in the Convention, dealing with Government aids, that is, subsidies, the practices of public undertakings, restrictive business practices and establishment. The characteristic which all these articles have in common is that, before complaint can be made of practices in the field in question, it must be shown that those practices are frustrating the benefits expected from the removal or absence of duties or quantitative restrictions on trade. In short, this is not a treaty about these subjects or one which secures absolute freedom of competition; provisions on these topics have been included in order to ensure that the substantive rules for the elimination of duties and quantitative restrictions are not evaded by means of practices in these other fields. In Article 13 on Government aids, there is even a refinement on this

point; practices whose 'main purpose or effect' is to frustrate these benefits are forbidden, but practices which incidentally frustrate these benefits are not forbidden but may justify compensatory countermeasures.

Article 15 on restrictive business practices should be given special notice. It is laid down that restrictive business practices, including the actions of dominant enterprises, are 'incompatible with this Convention insofar as they frustrate the benefits expected from the removal or absence of duties and quantitative restrictions on trade between Member States'. The Council may consider any practice brought before it and may order the publication of a report on the subject if it thinks this sanction desirable. But it is also laid down that these provisions shall be reviewed within four years and that the review shall consider:

'(i) specification of the restrictive business practices or dominant enterprises with which the Council should be concerned;
(ii) methods of securing information about restrictive business practices or dominant enterprises;
(iii) procedures for investigations;
(iv) whether the right to initiate inquiries should be conferred on the Council.'

These provisions are short and flexible and it will be hard to see their real meaning until after a few years of experience. The review will, no doubt, be an occasion when lawyers will consider them again.

Up to the present point the rules referred to in this Note have applied only to industrial goods. The rules laid down in Articles 21–28 for agricultural and fish products, as there defined, are different. In each case the members recognize that there are special factors affecting trade in these products, but the objective of the Association is to facilitate an expansion of trade in this sector also. Furthermore, a system of bilateral agricultural agreements linked to the Convention, from which the members principally interested in agricultural exports will benefit, is foreseen in order to make it more advantageous for them to join the Association. The United Kingdom has already concluded such an agreement, namely, the Agreement on Agriculture with Denmark signed at London on 8 April 1960.[1]

In the field of invisible transactions and transfers, the provisions of the Convention, Articles 29 and 30, are brief. There are already established organizations dealing with these subjects, and it would create confusion if the Association were to invade their spheres. The Council is given power to decide on further provisions in connexion with invisible transactions and transfers and to make recommendations in connexion with economic and financial policies. The Association does not wish to do anything in this field at the present time but might wish to do so in the future. The very tentative character of these provisions, especially when contrasted with the corresponding provisions of the Treaty of Rome, shows the general character of the Convention, namely, that it is directed primarily to the elimination of the traditional governmental barriers to trade, and that everything else in the Convention is subsidiary to this.

On the institutional side, the Council is the master of the Association, each member being represented on the Council and having one vote. But its functions under the Convention divide into two clearly defined fields, distinguished by the voting procedure. In the exercise of certain powers the Council can act only by unanimity; examples which might be cited are the power to amend certain provisions in the Convention and the power to add to the Convention provisions in certain fields where, in its original

[1] *Treaty Series*, No. 31 (1960), Cmnd. 1071.

form, the Convention lays down no rules. In the exercise of other powers, the Council acts by a majority composed of four affirmative votes; these powers might be described in general as powers to administer in detail provisions of the Convention laying down general rules and to apply the Convention to special cases arising in connexion with individual members. Examples are the authorization of special tariff arrangements where difficulties in particular sectors are being caused for a member by the elimination of Customs duties, or a decision that a breach of the Convention has been committed by a particular member. The distinction then is that, when the Council is a forum in which, in effect, new agreements are being concluded, there must be unanimity, but, where the rules laid down are being operated and administered, majority voting is prescribed. The Council also acts by majority vote in exercising its policing powers under Article 31 concerning complaints, which will be discussed shortly. Since at many points the provisions of the Convention are drafted in broad and general terms, it is to be expected that it will be worked out by successive decisions of the Council by majority vote when specific cases are brought before it. The body of case law so built up will then become the jurisprudence of the Convention, to which the Council may be expected to attach great importance since its individual decisions will in part be an interpretation of the words of the relevant Articles; on the other hand, the Council, not being here a judicial organ, will presumably be able to give full weight to the economic factors in each case which comes before it.

Two other organs of the Association should be mentioned. Presumably under the power in Article 32 (3), it has been decided to establish a 'consultative committee representing all aspects of industrial activity. Its membership will be drawn from bankers, industrialists, and trade unionists.'[1] As one possible stage in the procedure for dealing with complaints, which is discussed in the next paragraph, it is provided that complaints may be referred to an examining committee. These examining committees are to consist of persons selected for their competence and integrity and they are to act independently. Apart from this, the basis on which the members of these committees are selected would presumably depend on the particular question which was to come before them. Here again, time alone will decide the character of the institutions of the Association since it is uncertain how much use will be made of these two institutions and whether, despite their advisory character, they will become organs of independence and standing within the Association.

One of the keys to the character of an organization is how it settles disputes which may arise. Within the Association there is an arrangement which draws on various precedents but is in fact a new system. Under Article 31, 'if any Member State considers that any benefit conferred on it by the Convention or any objective of the Association is being or may be frustrated', and a satisfactory settlement cannot be reached in negotiations, it may refer the matter to the Council. The Council can then remit the question to an examining committee, whose constitution has already been described, and if any member concerned so requests, it must so refer it. The Council then considers the merits of the case, taking into account the report of any examining committee, and, by majority vote, may make recommendations. If, however, the Council finds, by a majority vote, that an obligation under the Convention has not been fulfilled, then the Council may, again by majority vote, authorize other members to cease to carry out towards the offending member such obligations under the Convention as the Council considers appropriate. There is also provision for the taking of interim measures to safeguard the situation in urgent cases. It will be seen that this

[1] *The Times*, 13 October 1960.

procedure makes a sharp distinction between cases of friction where a breach of the Convention has occurred and other cases. Only where a breach has occurred can the Council vary the obligations of the Convention. This procedure is therefore in some degree similar to that in Article XXIII of the General Agreement on Tariffs and Trade in that any matter may be brought before the Council. But it differs from that procedure in that retaliatory counter-measures can only be authorized when there is an express finding that a member is in breach of the Convention. In practice the character of the system may depend in part on how far questions are remitted to examining committees, how well those committees do their work and how far the Council follows the recommendations of the committees. But, in the last resort, the power rests with the Council; supporters of international law as a force in the world may criticize this system because it entrusts a judicial power to a body which deals also with the political affairs of the Association. On the other hand, within an Association covering so many technical questions, a body composed of Governments may be the best equipped to assess the various factors involved in a specific problem and, provided that the Governments act fairly, a system such as that established by Article 31 may in fact produce the best results.

The final clauses can be briefly mentioned. The Convention applies to the European territories of the members and may be applied to certain dependent territories in Europe at the request of the member concerned. The possibility of a wider extension to dependent territories is envisaged, but the decision on this question is deferred. Many Articles of the Convention can be amended by the Council by unanimous decision, but where this is not foreseen the amendments must be 'accepted by all Member States', which would no doubt require their submission to legislatures in at least some member States. There is a provision for withdrawal on twelve months' notice.

Relations with countries not within the Association may be established in two ways: a new member may accede under Article 41 (1) or, under Article 41 (2), an agreement, negotiated by the Council, may be concluded between the members and 'any other State, union of States or international organisation creating an association embodying such reciprocal rights and obligations, common actions and special procedures as may be appropriate'.

It is now time to stand back from all this detail and to try to see what general picture the Association presents. There is a free-trade area with all the necessary rules for the control of tariffs and quantitative restriction; there are certain general provisions on related subjects necessary to prevent evasion of the rules on duties and quantitative restrictions. Beyond this the harmonization and co-ordination of the economic, commercial and social systems of the members is not required to go, though it does not follow that, in other groupings, or even within the Association as it develops, the members might not go farther in this direction. Outside the agreed field of co-ordinated action, it is thought that it is to the advantage of the individual countries that each member should have full freedom to carry out whatever policies seem best to it in the light of its own special position and traditions, and that divergencies in these fields do not affect the fair and efficient working of the free-trade area. The form of the institutions reflects this position. Rules for the abolition of customs duties and quantitative restrictions are fundamentally based on arithmetic, and, while institutional procedures may be required to administer the rules and to control exceptions, they are not necessary to lay down the substance of the rules. The farther outside this field the co-ordination is to extend, the more independent and creative must the institutions be. The Treaty of Rome shows this by the extent to which, in fields outside tariffs and

quantitative restrictions, the power to initiate action and to propose detailed systems lies with the Commission. Under the Stockholm Convention the rules outside the fields of tariff and quantitative restrictions are of lesser importance and the institutional structure can therefore be simpler. The Council, endowed with wide powers of amendment, administrative powers to operate escape clauses, and judicial powers to determine breaches and impose sanctions, must be one of the most powerful and flexible of all organs in international life. Its flexibility arises in part out of the different voting régimes adopted and the importance of its decisions will grow as a body of practice in administering the Convention develops in the course of time. As one part of this practice, the shape of the Association may depend on how far the examining committees, which are only hinted at in the Convention, and the consultative committee, which is not mentioned at all, come to have an independent standing within the institutions of the Association. The lines of the picture have been drawn out clearly; they are waiting to be filled in.

H. G. Darwin

THE ENFORCEMENT OF JUDGMENTS: A CONVENTION WITH GERMANY*

On 14 July 1960 a Convention with the Federal Republic of Germany[1] for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial matters was signed.[2] This Convention is only the third of its kind (the other two being with France[3] and Belgium[4]) and, when it has entered into force, it will enable the Foreign Judgments (Reciprocal Enforcement) Act, 1933,[5] to be extended to Germany so that certain judgments of German courts may be directly and expeditiously enforced in England. Twenty-six years have elapsed since the last such Convention was signed, and it is not out of place now to scrutinize with some care the provisions of this new Convention and of the Act through which it will have effect in England.

At common law a foreign judgment cannot be directly enforced in England: a judgment creditor under a foreign judgment must, if he wishes to recover the debt in an English court, institute a fresh action at common law against the judgment debtor. This does not involve a particularly complicated procedure and does not normally impose great hardship on the judgment creditor[6] since English courts treat the foreign judgment itself as a cause of action. Such indirect enforcement is, nevertheless, more complicated than the more or less direct enforcement which is possible under the continental system whereby a foreign judgment can be enforced through the issue of an exequatur. There is the further disadvantage that the absence of any provision at common law for the direct enforcement of foreign judgments makes it very difficult to secure abroad the enforcement of English judgments, since foreign courts, which require reciprocity, are not easily assured of the efficacy of the common law's indirect procedure.

* © A. D. Watts, 1961.

[1] In this Note the Federal Republic of Germany will be referred to as Germany.

[2] Cmnd. 1118. [3] *Treaty Series*, No. 18 (1936). [4] Ibid., No. 31 (1936).

[5] 23 Geo. V, ch. 13. In this Note this Act will be referred to as 'the 1933 Act' unless the context requires or permits otherwise.

[6] 'In the great majority of cases the result is that the foreign judgment creditor obtains an English judgment within a very brief space of time and at a very small cost' (Gutteridge, this *Year Book*, 13 (1932), p. 54). But the defects of common law procedure nevertheless prompt the same writer to refer to the 'present archaic, cumbersome, and sometimes costly system of procedure by way of action on a foreign judgment *in personam*' (ibid., p. 67).

English law attained a simplicity similar to that of the continental exequatur procedure only in 1933. The problems of enforcing foreign judgments were, in 1918, referred to a Committee presided over by Lord Sumner.[1] This Committee reported in 1919,[2] and while it recommended that legislative provision should be made for the reciprocal enforcement of judgments pronounced by courts in British overseas territories, it considered that no change should at that time be made in the position as at common law for the enforcement of foreign (i.e. non-Commonwealth) judgments.[3] As a result of the Committee's recommendations the Administration of Justice Act, 1920,[4] was passed, providing for the expeditious enforcement of judgments of British overseas territories only.

Another Committee was established in 1931, under the chairmanship of Greer L.J., which was to

'consider (1) what provisions should be included in conventions made with foreign countries for the mutual enforcement of judgments on a basis of reciprocity, and (2) what legislation is necessary or desirable for the purpose of enabling such conventions to be made and to become effective, or for the purpose of securing reciprocal treatment from foreign countries'.[5]

The Committee reported in 1932. It recommended that appropriate legislation should be enacted, and considered that 'the existing principles of the common law [concerning the recognition and enforcement of foreign judgments] should be followed in matters of substance'.[6] A draft Bill was annexed to its report. The Committee further recommended that conventions should be concluded with France, Belgium and Germany, and with other countries 'as and when it is thought desirable'. There had, before and during the meetings of the Committee, been informal discussions with the French, Belgian and German authorities about the terms of suitable conventions, and as a result the Committee was able to annex to its Report draft conventions to be concluded with those three countries.

The Foreign Judgments (Reciprocal Enforcement) Act, 1933, followed very closely the draft Bill which had been prepared by the Greer Committee. If there is 'substantial reciprocity of treatment . . . as respects the enforcement in [a] foreign[7] country of judgments given in the superior courts of the United Kingdom', Part I of the Act may be extended to that foreign country by Order in Council.[8] The Order will also specify which courts of that foreign country are to be deemed 'superior courts' thereof.[9] The Act does not state how 'substantial reciprocity of treatment' is to be assured: although it has been usual for there to be a convention with a foreign country establishing a suitable degree of reciprocity, such conventions have not been found necessary with those

[1] British and Foreign Legal Procedure Committee, 1918.

[2] (1919), Cmd. 251. [3] Ibid., paragraphs 36–42.

[4] 10 and 11 Geo. V, ch. 81.

[5] *Report of the Foreign Judgments (Reciprocal Enforcement) Committee* (1932), Cmd. 4213, paragraph 1.

[6] Ibid., paragraph 18.

[7] Section 7 of the Act allows it to be applied to Her Majesty's dominions outside the United Kingdom as it applies to foreign countries. The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions) Order, 1933 (S.R. & O., 1933, No. 1073), was accordingly passed. The effect of that Order was not to extend the Act to the dominions referred to, but merely to make them 'foreign countries' so that an Order in Council under s. 1 of the Act, extending Part I of the Act to them, might subsequently be made: see *Yukon Consolidated Gold Corporation* v. *Clark*, [1938] 2 K.B. 241.

[8] S. 1 (1). [9] S. 1 (1).

Commonwealth territories to which the Act has been extended, and they are probably not necessary if sufficient reciprocity can be established by other means.[1]

Where a judgment of a superior court of such a foreign country (i) is final and conclusive between the parties, (ii) is given after the entry into force of the Order in Council extending Part I of the Act to that country, and (iii) requires the payment of a sum of money other than a sum in respect of taxes, fine or other penalty,[2] the judgment creditor may within six years apply to the High Court for the judgment to be registered: unless the judgment has been wholly satisfied or is unenforceable by execution in the country of the original court,[3] the High Court shall order the judgment to be registered.[4] A judgment so registered is, broadly speaking, capable of execution in England as if it were a judgment originally given in the court in which it was registered.[5] In certain circumstances, however, the registration shall be,[6] or may be,[7] set aside.

While the Act is principally concerned with making provision for the enforcement of foreign judgments, it also provides for the recognition of such judgments.[8] Further, the Act enables foreign judgments to be rendered unenforceable in any court in the United Kingdom.[9] This, under Section 9, can be done where 'it appears . . . that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the superior courts of the United Kingdom is substantially less favourable than that accorded by the courts of the United Kingdom to judgments of the superior courts of that country'. An Order in Council is necessary, the effect of which is, except in so far as the Order may direct, to prohibit proceedings from being entertained in any court in the United Kingdom for the recovery of any sum alleged to be payable under a judgment given in a court of the country concerned.

The Greer Committee had drawn up draft conventions to be concluded with France, Belgium and Germany, and it was not long before conventions substantially following those drafts had been concluded with France[10] and Belgium.[11] These two conventions, and that with Germany which has just been concluded,[12] follow the same pattern. There is a general obligation to recognize and enforce judgments in the circumstances laid down in the conventions.[13] Detailed provision is then made for the recognition of judgments, with the effect that judgments of superior courts are to be recognized unless one of several enumerated objections (e.g. lack of jurisdiction or fraud) can be sustained.[14] Subsequent Articles provide for the enforcement of judgments of superior courts if those judgments are not open to any of the objections which affect their recognition, are capable of execution in the country in which they were delivered, and require a definite sum of money to be paid.[15]

The different structure of the 1933 Act and of the conventions makes the exact coincidence between the provisions of the conventions and those of the 1933 Act more

[1] The Administration of Justice Act, 1920, required that, before the enforcement provisions of that Act could be extended to any particular British overseas territory, it had to be established that 'reciprocal provisions have been made by the legislature of [that] part of His Majesty's dominions . . . for the enforcement within that part of His dominions of judgments obtained in [the United Kingdom]' (S. 14 (1)). This requirement is now something of a dead letter, since the relevant Part of that Act can no longer be extended to any more countries (S. 7 (1) of the 1933 Act, and S.R. & O., 1933, No. 1073).

[2] S. 1 (1).

[3] 'Original court' in relation to any judgment means the court by which the judgment was given (S. 11 (1) of the 1933 Act).

[4] S. 2 (1).

[5] S. 2 (2).

[6] S. 4 (1) (*a*).

[7] S. 4 (1) (*b*); s. 5 (1).

[8] S. 8.

[9] S. 9.

[10] *Treaty Series*, No. 18 (1936).

[11] Ibid., No. 31 (1936).

[12] The provisions of the Convention with Germany are examined in greater detail below.

[13] Article II of the conventions.

[14] Article III of the conventions.

[15] Article V of the conventions.

difficult to attain. Each of the conventions, however, provides that there is nothing to prevent a party recognizing or enforcing judgments which it is under no obligation to recognize or enforce according to the convention in question. Nevertheless, the rigidity of the 1933 Act makes the negotiation of conventions with foreign countries a matter of no little difficulty. The conditions of registration under the 1933 Act are very precisely determined and it is not always easy to reconcile in a convention the imperative requirements of the English statute with the circumstances of the foreign country's legal system. The 1933 Act is the set standard for which there must be 'substantial reciprocity of treatment' by the foreign country if the 1933 Act is to be extended to that country: an agreement for reciprocal treatment at a level substantially lower than that of the 1933 Act will not enable the enforcement provisions of the Act to be applied, while agreement at a significantly higher level of treatment will exceed what is possible under the 1933 Act. This inflexibility is underlined by the manner in which the Act is extended to a foreign country, for it appears that the only alternative to applying to a foreign country the enforcement provisions of the Act in their entirety is not to apply them at all: partial application would seem not to be possible.

Nevertheless, whatever may be the defects of the 1933 Act, it made available a procedure for the enforcement of foreign judgments which has been generally considered to be satisfactory. The relatively small number of judgments which are at present enforced each year under the provisions of the two conventions concluded hitherto[1] is no real indication of their value. That the conventions exist at all probably conduces to the settlement of many disputes without recourse to litigation. Notwithstanding the potential benefits of the Act, it has not been applied to many foreign countries. The prospects of a widespread extension of the 1933 Act must have seemed great when it was made capable of extension to British overseas territories[2] in the year it was passed, followed by the signature of conventions with France[3] and Belgium[4] just over a year after its entry into force. But it was two years later that the conventions were ratified[5] and entered into force, and yet two more years before the 1933 Act was extended to any British overseas territories, namely, India and Burma.[6] The original impetus seemed to have been lost. The constitutional upheavals in the Indian sub-continent in 1947 resulted in the 1933 Act ceasing to apply to Burma[7] and continuing to apply to the States into which the former British India was divided, India[8] and Pakistan.[9] It was not until the extension of the 1933 Act to the Australian Capital Territory in 1955[10] that there was another substantive addition (the last before the signature of the recent Convention with Germany) to the territories to which the 1933 Act applies.

The Convention with Germany

Although the Greer Committee drew up a draft convention for Germany and preliminary discussions took place, negotiations were not completed before the out-

[1] In the five years from 1955 to 1959 inclusive only three Belgian and four French judgments were registered in England: in the same five years twenty-three copies of English judgments were registered for enforcement in France, and six for enforcement in Belgium, under the provisions of the conventions with those countries.

[2] S.R. & O., 1933, No. 1073.

[3] *Treaty Series*, No. 18 (1936).

[4] Ibid., No. 31 (1936).

[5] Ratifications of the Convention with France were exchanged on 16 May 1936, and of that with Belgium on 26 October 1936.

[6] S.R. & O., 1938, No. 1363.

[7] Burma Independence Act, 1947, S. 5 (4).

[8] Indian Independence Act, 1947, S. 18 (1); S.I., 1953, No. 192.

[9] S.I., 1953, No. 193. Section 18 (1) of the Indian Independence Act, 1947, would seem to have been insufficient to have resulted in the extension of the 1933 Act to Pakistan.

[10] S.I., 1955, No. 559.

break of war in 1939, and were suspended. After the war the negotiations were resumed, still largely on the basis of the draft prepared by the Greer Committee. The Convention as finally signed follows the general pattern of the earlier conventions with France and Belgium. In subsequent paragraphs of this Note those provisions of the Convention with Germany which raise matters of general interest in connexion with the 1933 Act and other conventions made in consequence of it will be briefly considered.

'*Superior courts*'[1]

It is only to judgments of superior courts that the 1933 Act applies,[2] but it does not define what is meant by 'superior court' in relation to a foreign country. It merely provides that the Order in Council which extends the registration provisions of the 1933 Act to a foreign country shall specify such of the courts of that country as are to be deemed its superior courts for the purposes of the Act.[3] This would seem to leave the foreign superior courts to be specified in the Order on the basis of whatever may have been negotiated in the Convention (or whatever else may be taken to satisfy the requirement of substantial reciprocity). The 1933 Act defines 'superior courts' in relation to the United Kingdom,[4] and it can only be taken as implicit in the 1933 Act, with its requirement of substantial reciprocity of treatment, that the superior courts of the foreign country should be comparable to those of the United Kingdom as defined. However, the 1933 Act does not lay down any general criterion of superiority but merely, in effect, gives a list of courts of the United Kingdom which are to be considered superior courts. A review of these specified superior courts of the United Kingdom and of the various foreign courts which have been designated as 'superior courts'[5] would seem to show that the test for such a court is that it is a court with no upper limit to its jurisdiction. Thus, for example, the residuary category of superior courts in the definition of that term in respect of India and Pakistan is as follows:

'all other courts whose civil jurisdiction is subject to no pecuniary limit provided that the judgment sought to be registered under the said Act is sealed with a seal showing that the jurisdiction of the Courts is subject to no pecuniary limit'.[6]

An innovation in the enumeration in the Convention with Germany of the superior courts of the United Kingdom is that for the first time the Scottish Sheriff Court is included.[7] Although this Court is not included in the definition of the United Kingdom's superior courts in the 1933 Act, its inclusion in the Convention is not incorrect. The 1933 Act lays down the courts of the United Kingdom for whose judgments the foreign country must afford substantial reciprocity of treatment, and, so long as there is such reciprocity for their judgments, similar treatment for the judgments of additional courts would not seem to be excluded.

[1] Article I (2) of the Convention with Germany.

[2] S. 1: see the observations of Slessor L.J. on the term 'superior court' in *Yukon Consolidated Gold Corporation* v. *Clark*, [1938] 2 K.B. 241 at p. 258.

[3] S. 1 (1) (*b*).

[4] S. 11 (1). The definition is, strictly, of 'judgments given in the superior courts of the United Kingdom'.

[5] See S.R. & O., 1936, No. 609, Article 3 (France); S.R. & O., 1936, No. 1169, Article 3 (Belgium); S.R. & O., 1938, No. 1363, Articles 3 and 4 (British India and British Burma); S.I., 1953, No. 192, Article 4 (India); S.I., 1953, No. 193, Article 3 (Pakistan); S.I., 1955, No. 559, Article 2 (Australian Capital Territory). The specification of superior courts of Germany is in Article I (2) of the Convention with Germany.

[6] S.I., 1953, No. 192, Article 4; S.I., 1953, No. 193, Article 3.

[7] Article I (2) (*a*) of the Convention with Germany.

General obligation to recognize and enforce judgments[1]

Article II of the Convention with Germany contains the general obligation for each party to recognize and enforce, in accordance with the provisions of the Convention, 'judgments pronounced by a superior court in the territory of [the other] High Contracting Party, other than judgments given on appeal from inferior courts,[2] whatever the nationality of the judgment creditor or debtor'.[3]

The only general category of judgments excluded from the operation of the Convention are those in bankruptcy proceedings or proceedings for the winding up of companies or other bodies corporate.[4] While, clearly, there is thus no obligation under the Convention to enforce such judgments, they would not seem thereby excluded from registration under the Act. The terms of the Convention do not themselves limit the operation of the Act, and, we have seen,[5] it seems that where the 1933 Act applies it applies in its entirety. To this extent, therefore, it appears possible for a judgment creditor under a foreign judgment to enforce in England, under the 1933 Act, a judgment to which the Convention does not apply and which might well not be enforceable in the foreign country.[6]

Although Article II (1) of the Convention with Germany imposes an obligation to recognize and enforce only those judgments covered by the convention, Article II (3) expressly preserves the power for each party to recognize and enforce, in accordance with its own municipal law, judgments to which the Convention does not apply or in respect of which the Convention does not require recognition or enforcement.

Recognition of judgments[7]

The principal provisions of the 1933 Act concern the enforcement of foreign judgments through the registration procedure provided in Part I of the Act: the recognition of foreign judgments is dealt with shortly[8] in that Part of the Act headed 'Miscellaneous and General'. In the conventions, on the other hand, the recognition of judgments may almost be said to take pride of place. The criteria for recognition are dealt with in detail, and are then merely incorporated by reference into the provisions governing the enforcement of judgments. Consequently many of the detailed conditions for the registration of judgments under the 1933 Act are, in the conventions, to be found reflected in the conditions upon which judgments are to be recognized. Thus, in examining the provisions of the conventions in the light of those of the 1933 Act it is sometimes necessary to compare the recognition provisions of the one with the enforcement provisions of the other.

Article II (1) of the Convention with Germany imposes the general obligation to recognize and enforce judgments issued by courts of the other party. That general obligation is, however, to recognize and enforce judgments 'in the cases and upon the conditions laid down in Articles III to IX inclusive of the present Convention'. The

[1] Article II of the Convention with Germany.

[2] An 'inferior court' is any court not a superior court (Article I (2) of the Convention with Germany).

[3] Article II (1) of the Convention with Germany.

[4] Article II (2) of the Convention with Germany.

[5] Above, p. 362.

[6] The position is similar in respect of those categories of judgments excluded from the operation of the Convention with France (see Article 2 (3) of that Convention).

[7] Article III of the Convention with Germany.

[8] S. 8.

recognition[1] of judgments, as opposed to their enforcement, is governed by Articles III and IV of the Convention.

Article III (1) of the Convention provides a specific obligation to recognize judgments which are (*a*) judgments in civil and commercial matters,[2] (*b*) given after the date of entry into force of the Convention, and (*c*) given by any superior court in the territory of one contracting party.[3] Any judgments satisfying those conditions must be recognized unless there is or may be a pending appeal[4] or unless an objection to the judgment can be established on any of the following grounds: (i) that the original court lacked jurisdiction,[5] (ii) that the judgment was given by default, the judgment creditor not having appeared in the proceedings nor having had knowledge of them in time to act upon it,[6] and (iii) that recognition would be against the public policy of the court applied to.[7]

One of the objections which may thus be raised to the recognition of a judgment is that it would be contrary to the public policy of the court applied to. 'Public policy' in English law is a term of art,[8] and its restricted meaning as such is not necessarily to be applied to the term as it appears in an international convention. In the Convention with Germany the objection of public policy is expressed to 'include' cases where the judgment has been obtained by fraud;[9] where the judgment is in respect of a cause of action which was, at the date of the judgment of the original court, already *res judicata*;[10] where the defendant before the original court was entitled to immunity from its jurisdiction under the rules of public international law;[11] and where the person against whom the judgment is sought to be enforced is similarly entitled to immunity from the jurisdiction of the court applied to.[12] While effect can, of course, be given to each of these provisions in English law, it is evident that they are not included in the objection based on 'public policy' as that objection is understood in English law: in the Convention the term 'public policy' is probably somewhat nearer in meaning to the continental concept of *ordre public*.[13]

Jurisdiction[14]

One of the objections which, under Article III (1) of the Convention with Germany, may be made to the recognition of a judgment is that the jurisdiction of the original

[1] 'The recognition of a judgment means that such judgment shall be treated as conclusive as to the matter thereby adjudicated upon in any further action between the same parties . . . and as to such matter shall constitute a defence in any further action between them in respect of the same cause of action': Article III (4) of the Convention with Germany. See S. 8 of the 1933 Act.

[2] See Article I (6) of the Convention with Germany.

[3] Although those are the only conditions appearing on the face of Article III (1), there must be added the further limitations which result from Article II: namely, that the judgments, even if given by a superior court, must not have been given by them on appeal from an inferior court, nor may they be judgments in bankruptcy proceedings or proceedings for the winding up of companies or other bodies corporate.

[4] If there is a pending appeal, or the possibility of one, the court applied to may refuse recognition of the judgment or adjourn a decision on recognition: Article III (2) of the Convention with Germany.

[5] Article III (1) (*a*) of the Convention with Germany.

[6] Article III (1) (*b*) of the Convention with Germany.

[7] Article III (1) (*c*) of the Convention with Germany.

[8] See in general Dicey, *Conflict of Laws* (7th ed.), pp. 1002–7.

[9] Article III (1) (*c*) (ii) of the Convention with Germany; see S. 4 (1) (*a*) (iv) of the 1933 Act.

[10] Article III (1) (*c*) (i) of the Convention with Germany; see S. 4 (1) (*b*) of the 1933 Act.

[11] Article III (1) (*c*) (iii) of the Convention with Germany; see S. 4 (3) (*c*) of the 1933 Act.

[12] Article III (1) (*c*) (iv) of the Convention with Germany.

[13] The German text of the Convention uses the term *öffentliche Ordnung*; the French text of the equivalent provisions of the conventions with France and Belgium refers to *ordre public*.

[14] Articles III (1) (*a*) and IV of the Convention with Germany.

court is not recognized under the provisions of a later Article[1] which specifies the grounds on which the original court must have had jurisdiction.

The Convention with Germany differs from the precedent set by the conventions with France and Belgium in the way in which it establishes this requirement of jurisdictional competence. Each of those two earlier conventions provides that a judgment is to be recognized unless, *inter alia*, 'the jurisdiction of the original court is not recognised under the rules of Private International Law with regard to jurisdiction observed by the court applied to'.[2] The subsequent Article[3] of these conventions, however, provides that 'notwithstanding the provisions [just referred to] . . . the original court shall be recognised as possessing jurisdiction in all cases' which are specified in the remainder of the Article. Reading these two provisions together might leave room for ambiguity where the rules of private international law observed by the court to which application is made, recognize that a foreign court has jurisdiction in circumstances outside those specified. The word 'notwithstanding' seems to nullify the general provision that the jurisdiction of the original court merely has to be recognized under the rules of private international law of the court applied to, and to replace it with specific grounds of jurisdiction in the exercise of which the original court must have acted if the recognition of its judgment is not to be open to objection under the terms of the Convention; but it is not impossible that the effect is merely to set at rest any doubts about the possession of jurisdiction in the cases specified, so that a judgment given in exercise of any additional grounds of jurisdiction is, nevertheless, an acceptable judgment. This ambiguity in the terms of the conventions with France and Belgium is to some extent reflected by (or is a reflection of) a similar ambiguity in the 1933 Act. It is provided in that Act that there shall be no registration of a foreign judgment if 'the courts of the country of the original court had no jurisdiction in the circumstances of the case'.[4] Later in the same section it is provided that 'for the purposes of this section the courts of the country of the original court shall . . . be deemed to have had jurisdiction' in certain specified cases (in effect, the same cases as those specified in the conventions).[5] Does this deeming of certain grounds of jurisdiction to be sufficient merely set at rest possible doubts, leaving it open to an English court to hold that a foreign court had jurisdiction in circumstances other than those specified,[6] or is it the meaning of the provision that the original court shall be deemed to have had jurisdiction only in the cases specified? The learned editor of Dicey observes that 'whilst the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in laying down what bases of jurisdiction are acceptable for its purposes, does not . . . specifically state that these are the "only" bases which will suffice, it will surely be interpreted in [that] sense'.[7] It is noticeable that the 1933 Act, after specifying the bases for jurisdiction for actions *in personam* and certain other actions, provides that the original court shall be deemed to have had jurisdiction 'in the case of a judgment given in an action other than any such action as is mentioned [above], if the jurisdiction of the original court is recognised by the law of the registering court'.[8] This would seem to imply, for those *actions* which are mentioned (e.g. actions *in personam*), that the only grounds of jurisdiction which are acceptable for the purposes of the Act are those set out in the Act.

The Convention with Germany has avoided any such possible ambiguity. It does

[1] Article IV of the Convention with Germany. [2] Article III (1) (*a*) of each Convention.
[3] Article IV of each Convention. [4] S. 4 (1) (*a*) (ii). [5] S. 4 (2).
[6] Whether or not there are or may be grounds for jurisdiction accepted at common law in addition to those specified in the 1933 Act is considered briefly below, p. 367.
[7] Dicey, *Conflict of Laws* (7th ed.), p. 1020. [8] S. 4 (2) (*c*).

not refer to the determination of jurisdiction according to the rules of private international law of the court applied to, but instead provides[1] that the jurisdictional objection to the recognition of a judgment shall be that 'the jurisdiction of the original court is not recognised under the provisions of [the subsequent] Article', which Article[2] in turn repeats, almost verbatim, the jurisdictional provisions of the 1933 Act. This adds considerably to the clarity of the Convention and to the extent to which its terms coincide with those of the Act.

The specific bases of jurisdiction are set out in Article IV of the Convention with Germany, and while, as noticed above, they follow very closely the provisions of the 1933 Act, they are also in effect substantially the same bases of jurisdiction as are expressly mentioned in the conventions with France and Belgium.[3] The Greer Committee, in drawing up for the purposes of their draft Bill the rules for determining whether or not a foreign court has jurisdiction in actions *in personam*, considered that those which they set out were 'substantially in accordance with existing Common Law rules', although they found it 'desirable and necessary, in order to secure international agreements which would be likely to operate satisfactorily in practice to make one or two very slight departures from the common law rules'.[4] A comparison between the provisions of the 1933 Act relating to jurisdiction in actions *in personam* and the opinions expressed by leading commentators shows that for the purposes of the 1933 Act only those bases of jurisdiction are acceptable which are clearly established at common law: those bases of jurisdiction which, while they may well exist, cannot be said certainly to exist have not been included in the Act—without prejudice, it is thought, to the possibility of their existence at common law.[5]

Attention may be drawn to two further points in connexion with the specific grounds for jurisdiction. First, the Convention with Germany provides that the jurisdiction of the original court need not be recognized if the subject-matter of the proceedings is immovable property outside the country of the original court. Although there is no equivalent provision in the conventions with France and Belgium, the same effect would seem to have been achieved in a different manner.[6] In any event, some such provision is needed in order to take account of an analogous provision in the 1933 Act.[7] The second matter is that, by a Protocol of Signature to the Convention with Germany, it has been agreed that nothing in the Convention shall prevent a German court from declining to recognize or enforce any judgment against a German national if, to the prejudice of that national, it is not based on the laws which would have been applicable in accordance with German private international law in respect of certain

[1] Article III (1) (*a*) of the Convention with Germany.

[2] Article IV of the Convention with Germany. [3] Article IV of both conventions.

[4] See paragraphs 7, 8 and 9 of Annex V to the Report of the Foreign Judgments (Reciprocal Enforcement) Committee, 1932, Cmd. 4213.

[5] The view is expressed in the latest edition of Dicey that 'the jurisdiction conceded to a foreign court in relation to judgments registrable under [the 1933] Act is, as is apprehended, identical with the jurisdiction such a court is traditionally admitted to have of giving judgments capable of enforcement or recognition at common law' (*Conflict of Laws* (7th ed.), p. 1018). This view would appear to do less than justice to the arguments which have been put forward in support of bases of jurisdiction other than those listed in the 1933 Act: the state of the authorities is too uncertain (as a comparison between the 6th and 7th editions of Dicey alone shows), and the present flexibility in matters of jurisdiction too evident, for it to be possible or desirable to say now that the provisions of a statute passed in 1933 reflect the *only* grounds of jurisdiction acceptable at common law (particularly when current opinion at the time of the passing of the Act did not consider that to be so). [6] Article IV (2) of both conventions.

[7] S. 4 (3) (*a*). For a discussion of the extent to which this provision represents a rule of common law, see Dicey, *Conflict of Laws* (7th ed.), pp. 1015–16.

specified subjects (primarily concerned with matters of personal status and family rights).

Enforcement of judgments[1]

The provisions of the Convention with Germany which have just been considered relate to the recognition of judgments. In Article V of the Convention the basic provisions for their enforcement are set out. The details of the procedure for enforcement differ for each party to the Convention: in the United Kingdom a judgment is enforced by way of registration, as provided in the 1933 Act,[2] while in Germany enforcement is effected by means of an executory declaration. In effect a judgment, to be enforceable under the Convention with Germany, must be a judgment in civil or commercial matters to the recognition of which no objection can be established,[3] provided in addition that it is capable of being executed in the country of the original court,[4] that by the judgment a definite sum of money is made payable,[5] that the debt due under the judgment has not been satisfied[6] since the original court gave its judgment,[7] and that the right to enforce the judgment is vested in the person seeking enforcement.[8]

Under the 1933 Act detailed provision is made for the procedure to be followed in registering a judgment. While these need not be examined in a survey of this nature, one of the provisions of the 1933 Act which marked an innovation should be mentioned. Section 6 provides that if a judgment is a judgment to which Part I of the Act applies, no proceedings, other than by way of registration, shall be entertained by any court in the United Kingdom for the recovery of a sum payable under that judgment. This is a curiously worded provision. It would seem to be the intention that where the registration procedure is available for the recovery of a sum of money it, and no other, should be used. It is said, however, that the section does not debar the beneficiary of a registrable foreign judgment from suing at common law on his original cause of action.[9] Since the 1933 Act prohibits 'proceedings for the recovery of a *sum payable under* a foreign judgment', it might seem arguable that a claim for damages in England on the original cause of action, already the subject of a foreign judgment for damages, is a claim for a sum which is payable under the foreign judgment: it seems to be a question whether, for the prohibition against proceedings other than by way of registration to

[1] Articles V to IX of the Convention with Germany.

[2] S. 2.

[3] Article V (2) (*d*) of the Convention with Germany.

[4] Article V (2) (*b*) of the Convention with Germany.

[5] Article V (2) (*c*) of the Convention with Germany. The terms of this provision would seem to avoid the possibility of a decision being reached similar to that on the equivalent provision of the Convention with France, in which, after a plaintiff's action in England had been dismissed and he had been ordered to pay the defendant's costs, it was held in France (where the defendant tried to enforce against the plaintiff the order for costs) that the order for costs was not a judgment which had to be enforced under the Convention with France since there was no principal judgment for the payment of a sum of money (*Journal du droit international* (1938), p. 303).

[6] Where a judgment has been partially satisfied, it may be registered in respect of the unsatisfied part: Article VIII (2) of the Convention with Germany, S. 2 (4) of the 1933 Act.

[7] Article VIII (1) (*a*) of the Convention with Germany.

[8] Article VIII (1) (*b*) of the Convention with Germany.

[9] Dicey, *Conflict of Laws* (7th ed.), pp. 989, 1051. This is possible because in English law a foreign judgment does not, of itself, extinguish the original cause of action in respect of which the judgment was given (loc. cit., p. 996): but in Scottish law the original cause of action is probably extinguished, and consequently it might not be possible to sue in Scotland on the original cause of action. The provisions of Section 6 were invoked by one party in *Yukon Consolidated Gold Corporation* v. *Clark*, [1938] 2 K.B. 241, but in the event there was no need for the Court to decide on their effect.

apply, the sum must be claimed as a sum payable under a foreign judgment, or whether it is sufficient merely that, whatever the basis on which the sum is claimed in England, a foreign judgment has also ordered its payment. No English court has yet decided the point, but opinion is strongly in favour of allowing proceedings on the original cause of action. It is relevant that Section 9 of the 1933 Act uses the same terminology as Section 6 in giving the 'power to render unenforceable by action in the United Kingdom the judgments of foreign countries which refused to grant reciprocity',[1] and the meaning of this provision, which applies to judgments which cannot be registered, would perhaps be strained if it were interpreted as prohibiting both the use of the foreign judgment as a cause of action and also resort to the original cause of action itself.

A further curious consequence of the same section is that it appears to exclude proceedings, other than by way of registration, for some judgments which may not in any event be capable of registration. The prohibition of proceedings other than by way of registration applies not to judgments which may be registered, but to judgments to which Part I of the Act applies. However, for example, the possession of jurisdiction, or compliance with the six-year time limit for registration, do not affect the question whether or not a judgment is one to which Part I applies (within the definition in Section 1 (2) of the 1933 Act), and thus a foreign judgment given by a court which has taken jurisdiction on a basis other than those stated in the 1933 Act, or one not registered within six years, may nevertheless be a judgment to which Part I of the Act applies: such a judgment would apparently be neither registrable nor capable of being the subject of other proceedings for the recovery of sums payable under it.

To return to the consideration of the provisions of the Convention with Germany, Articles VI to IX concern the details of the procedure for enforcing judgments. Articles VI and VII set out the procedure for making an application for enforcement, this involves the submission of such an application to a specified authority, accompanied by a certified copy of the original judgment including the reasons for it[2] and a certificate that it is capable of execution in the country of the original court. Article VIII provides for the refusal of registration (or of the grant of an executory declaration) on certain grounds.[3] Article IX provides that where an application for registration or for an executory declaration has been duly made under Article VI or VII, the court applied to may only entertain objections based on Article V[4] (read with Articles III[5] and IV[6]) or Article VIII,[7] and if no such objection is established the court applied to shall grant the application. Article IX further provides that 'the procedure for the registration of a judgment . . . and for the grant of an executory declaration . . . shall be simple and summary';[8] that security for costs shall not be required from the person applying for registration or for the grant of an executory declaration; and that any such application must be made within six years of the date of the judgment of the original court or, if an appeal has been brought, from the date of the judgment of the highest court appealed to.

The final Articles of the Convention with Germany provide that difficulties connected with the interpretation or application of the Convention shall be settled through

[1] Paragraph 14 of Annex V to the *Report of the Foreign Judgments (Reciprocal Enforcement) Committee* (1932), Cmd. 4213.

[2] See *Journal du droit international* (1953), p. 129, for a report of a French decision on the equivalent provision of the Convention with France.

[3] Above, p. 368.

[4] Above, p. 368.

[5] Above, pp. 365–7.

[6] Above, pp. 365–7.

[7] Above, p. 368.

[8] See Order 41B of the Rules of the Supreme Court.

the diplomatic channel (Article X), that the Convention shall apply to Land Berlin[1] unless the contrary is stated within a certain time (Article XI), that the application of the Convention may be extended to territories for whose international relations the Government of the United Kingdom is responsible (Article XII), and for its ratification and entry into force (Article XIII).

The conclusion of the Convention with Germany affords reassurance that the enforcement procedure provided by the 1933 Act is not being allowed to fall into disuse. It is, indeed, understood that the first steps towards similar conventions with Austria, Denmark, Italy, Norway and Sweden have already been taken. Thus bilateral arrangements for the reciprocal enforcement of judgments may well soon extend to most of the countries of western Europe, a development desirable in itself, and also in keeping with the United Kingdom's growing political and economic involvement in Europe.

A. D. Watts

INTERNATIONAL COMMERCIAL ARBITRATION, STATE SUCCESSION AND THE COMMONWEALTH*

The objective in the field of international commercial arbitration has been to establish a system within which arbitration agreements made between subjects of different States are effective, and in which provision is made for awards made in one State to be enforced in another State where the losing party may possess assets. It was to secure this objective that the Geneva Protocol on Arbitration Clauses and the Geneva Convention on the Execution of Foreign Arbitral Awards were promoted by the League of Nations in 1923 and 1927 respectively.[2] Parties to the Protocol agreed to recognize the validity of arbitration agreements made between persons subject to the jurisdiction of different contracting parties. Parties to the Convention agreed to recognize as binding and to enforce foreign awards which came within the following definition: (*a*) awards made in pursuance of an agreement to which the Protocol applied; (*b*) awards made in the territory of one of the parties to the Convention; (*c*) awards made between persons both of whom were subjects of at least one contracting party.

Implementing legislation was passed in various countries to give effect to the Protocol and the Convention. In England and in India this legislation introduced certain further conditions the satisfaction of which would be necessary for the enforcement of foreign awards.

The English legislation, as it is embodied in Part II of the Arbitration Act, 1950[3] ('the English Act') provides that a foreign award in order to be enforceable under the Act would have to come within the following definition: (*a*) it must be made

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[1] Land Berlin is not covered by the term 'Federal Republic of Germany': see Article XI (2) of the Covention with Germany.

[2] The Protocol was opened for signature at Geneva on 24 September 1923 and came into force on 28 July 1924. It was ratified by thirteen States and was subsequently acceded to by sixteen additional sovereign powers. The Convention entered into force on 5 July 1929. Legally binding twenty-four States, it supplemented the Protocol, since parties to the later agreement automatically acceded to the former one. See Sultan, 'U.N. Arbitration Convention and U.S. Policy', *American Journal of International Law*, 53 (1959), at pp. 809 and 810, notes 22, 23 and 29. Also Hudson, *International Legislation*, vol. ii, pp. 1062 et seq., and vol. iii, pp. 2153 et seq.

[3] The Arbitration Act, 1950 (14 Geo. VI, c. 27), is a Consolidating Act, 'to consolidate the Arbitration Acts, 1889 to 1934' and re-enacts, *inter alia*, the Arbitration Clauses (Protocol) Act, 1924 (14 & 15 Geo. V, c. 39), as amended by the Arbitration (Foreign Awards) Act, 1930 (20 & 21 Geo. V, c. 15). The relevant provisions are embodied in Section 35.

pursuant to an agreement for arbitration to which the Protocol applies; (*b*) it must be made between persons one of whom is subject to the jurisdiction of someone of such Powers as His Majesty, being satisfied that reciprocal arrangements had been made, had by an Order in Council declared to be parties to the Convention set out in the Second Schedule to the Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and (*c*) it must be made in one of such territories as His Majesty, being satisfied that reciprocal provisions had been made, had by an Order in Council declared to be territories to which the said Convention applied.

The implementing legislation in India took the form of the Arbitration (Protocol and Convention) Act, 1937 ('the Indian Act'). Section 2 of that Act provided that only such foreign awards would be enforceable as fell within the definition given in the Act, which is identical with the definition in Section 35 of the English Arbitration Act, 1950, except that here, instead of His Majesty, it was the Central Government which was to satisfy itself as to reciprocal arrangements having been made; and the declaration that such arrangements had been made by a particular State, was to be made by the Central Government in the *Gazette of India*.

The implementing legislation, therefore, introduced two features into the enforcement system of the Geneva Convention. It introduced the requirement of reciprocity and, secondly, the Executive branch of the Government was given an important place in the system as it was that branch which was to determine whether reciprocal arrangements had been made or not. The precise words used in Section 35 of the English Act and in Section 2 of the Indian Act are somewhat curious. The Executive, having satisfied itself that reciprocal arrangements had been made by a State, was required not merely to declare this fact, but was required to make a declaration to the effect that that state was a 'Party to the Convention'.

The emergence of India and Pakistan as independent States in 1947, and the curious form of the declaration required to be made by the English, the Indian and the Pakistani Act[1] has now resulted in considerable uncertainty as regards the enforceability of English awards in India and Pakistan and of Indian and Pakistani awards in England. Thus, whereas it has been doubted whether an Indian award or a Pakistani award is enforceable in England,[2] an Indian court has held an English award to be enforceable in India;[3] yet a Pakistani court has held that as Pakistani awards are not enforceable in England, an English award is not enforceable in Pakistan.[4] The trouble is that the

[1] Pakistan adopted many of the statutes in force in Briti h India immediately prior to independence, including the Arbitration (Protocol and Convention) Act, 1937.

[2] In Halsbury's *Laws of England* (3rd ed.), vol. 2, in the subsection dealing with the enforcement of foreign awards the following note appears at p. 52, note (*q*): 'Arbitration (Foreign Awards) No. 1 Order, 1938, S.R. & O. 1938 No. 137. Although it is considered that India and Pakistan are now effective participants in the Convention, it *may be* that a further Order is required in view of the fact that the Arbitration (Foreign Awards) No. 1 Order, 1938 . . . merely declared that India was a territory to which the Convention applied and did not declare India to be a Party to the Convention.'

[3] *Francesco Corsi* v. *Gorakhram Gokalchand*; Bombay High Court, judgment reported in *All India Reporter*, 47 (1960), p. 91. Also recently an English arbitral award was enforced by the Calcutta High Court, without even considering the position in international law, or whether an Indian award would be enforceable in England. See *Shiva Jute Baling Ltd.* v. *Hindley & Co. Ltd., Calcutta Weekly Notes*, 57 (1952–3), at p. 573. More recently the Calcutta High Court did not enforce an English award on the substantive ground that the award was not in conformity with the law governing the arbitration procedure, but neither the Counsel nor the Court felt it necessary to raise the question whether an English award was enforceable at all in India. See *S. Mohd. Naim Mohd. Alam* v. *Rouraffic and Far Eastern Ltd., All India Reporter*, 47 (1960), at p. 146.

[4] *Barlas Bros.* (*Karachi*) *& Co.* v. *Yangtze* (*London*) *Ltd.*; West Pakistan High Court (Karachi

application of the Arbitration (Protocol and Convention) Act in India and Pakistan now necessitates the determination of certain fine points of international law, and these points have been differently determined in India and Pakistan.

British India was a party to the Protocol and Convention. In 1937 India passed implementing legislation, i.e. the Indian Act, and in 1938 a notification was published whereby the Government of India declared that it was satisfied that the reciprocal arrangements had been made for the enforcement of Indian awards by the States listed therein. Therefore, in the curious terms of Section 2 of the Act, India declared that it considered Her Britannic Majesty, among others, to be a party to the Convention and declared the United Kingdom of Great Britain and Northern Ireland to be a territory to which the Convention applied. At the same time, in 1938, an Order in Council was passed pursuant to the Section of the old Act of which Section 35 of the English Act is a re-enactment, declaring India to be a territory to which the Convention applied. India still being subject to the Crown, it was presumably not felt necessary to declare India a party to the Convention. The constitutional changes in 1947, however, raise the following questions: (*a*) Is the new India a party to the Protocol and Convention?; (*b*) Is Pakistan a party to the Protocol and Convention?; (*c*) Is His Majesty's Order in Council of 1938 declaring India to be a territory to which the Convention applied sufficient to provide for the enforcement of Indian and Pakistani awards in England?; (*d*) Is an English award now enforceable in India and Pakistan?

In Pakistan these questions arose for determination in the West Pakistan High Court in 1959[1] in the following circumstances: a Pakistani exporter of sheep casings entered into various contracts between 1948 and 1950 for the export of that commodity to an importer in London. The contracts contained an arbitration clause which provided that disputes arising under the contracts were to be referred to the London Court of Arbitration. Disputes arose under the contract and were referred to the London Court of Arbitration which ultimately made an award in favour of the importer in 1952. The importer, thereafter, sought to have the award enforced under the Arbitration (Protocol and Convention) Act, 1937.

The award was initially filed in court, but on appeal, the West Pakistan High Court held that an English award was not enforceable in Pakistan for the following reasons: (*a*) Pakistan was not and could not be deemed to be a party to the Protocol and Convention as Pakistan was a new State and hence did not succeed to the treaties of its predecessor, nor could it become a party to the Treaty by unilateral declaration, as the consent of the other parties was necessary for novation; (*b*) that no Order in Council had been passed in England declaring Pakistan to be a State party to the Convention, pursuant to Section 35 of the English Act, and hence a Pakistani award would not be enforceable in England. Therefore, a Pakistani court would not enforce an English award.

Early in 1960 an English award was sought to be enforced in India in the following circumstances:[2] an Italian importer bought from an Indian exporter certain quantities of ground-nut oil. The terms and conditions of the contract were to be in accordance with the London Oil and Tallow Trade Association's Contract, which provides for the settlement of disputes under the contract in London. Disputes having arisen the importer referred the matter to arbitration in London and obtained an award in his favour, which he sought to enforce under the Arbitration (Protocol and Convention) Act.

Bench), judgment reported in *Pakistan Legal Decisions*, 9 (1959), p. 423. This judgment has also recently been followed by a court in East Pakistan.

[1] *Pakistan Legal Decisions*, 9 (1959), p. 423.

[2] See above, p. 371, n. 3.

The objections analogous to those successfully taken in the West Pakistan High Court were pressed by the appellant before the Bombay High Court. It was contended that the Convention on the Execution of Foreign Arbitral Awards had not been duly signed on behalf of the Government of India after India had attained independence. Counsel for the Respondent also placed before the Court the statement in Halsbury's *Laws of England* that although there was an Order in Council declaring India to be a territory to which the Convention applied, there was no Order in Council declaring India to be a party to the Convention.[1] Presumably he sought in this way to reinforce the point that the new India was not a party to the Convention. It is not clear whether the absence of any such Order was also used, as it might have been, to support an argument that the Order not having been made, an Indian award would not be enforceable in England, and hence in the absence of reciprocity an English award could not be enforced in India.

The Bombay High Court held that India was a party to the Convention as by virtue of the Indian Independence (International Arrangements) Order, 1947, India had declared that the rights and obligations under international arrangements which applied to British India: (*a*) would devolve upon India in respect of those arrangements which had exclusive territorial application to the territory occupied by the new India; (*b*) would devolve upon Pakistan in respect of international arrangements which had exclusively territorial application to the territory occupied by Pakistan; and (*c*) would devolve upon both in respect of those arrangements which were not so limited in their territorial application. The Indian Independence (International Arrangements) Order, 1947, is also in force in Pakistan.[2]

The opposite conclusions reached by an Indian and a Pakistani High Court with respect to the enforceability of an English award indicate the uncertainty that now exists as to the enforceability of English awards in India and Pakistan and of Indian and Pakistani awards in England. The reasons for this uncertainty arise from the complexity of the question of State succession in this context and also from the peculiar scheme of the implementing legislation in England, Pakistan and in India, which scheme does not seem to have been fully appreciated by either of the High Courts.

The question regarding State succession arose squarely in both cases. Did India and Pakistan become parties to the Protocol and Convention upon independence? The Pakistani Court relied upon the orthodox doctrine enunciated in McNair[3] and Hall[4] and held that Pakistan was a new State which did not succeed to the treaties made by the Crown in respect of British India. Further, it held that the declaration by Pakistan in the Indian Independence (International Arrangements) Order, 1947, could not have the effect of making Pakistan a party to the Convention as the express consent of other parties to the treaties was necessary in order to make Pakistan a party to them by novation.

[1] See above, p. 371, n. 2.

[2] The precise legal effect of the Order cannot be easily appreciated. The Order declares that the provisions regarding the devolution of the treaty rights and obligations of British India embodied in the Schedule of the Order should have effect as an agreement duly made between India and Pakistan. By this agreement India and Pakistan have as between themselves apportioned the treaty rights and obligations of British India. It may be questioned whether treaty *rights* at any rate can be adopted by successor States without the consent of the other party or parties to the treaties, that is, without novation. The question also arises as to whether a Pakistani or Indian court is justified in holding by reference to international law that Pakistan or India is not a party to a treaty, which the Pakistan or Indian Government, pursuant to the Order, consider themselves to be a party to.

[3] McNair, *The Law of Treaties* (1938), ch. xxxv, at p. 389 and ch. xxxviii, at p. 469.

[4] Hall, *A Treatise on International Law* (8th ed., 1924), § 27.

The Indian Court was somewhat less sophisticated and held that India was a party to the Convention as a result of its declaration in the Indian Independence (International Arrangements) Order. The Indian Court did not consider the point that consent of other parties to the Convention was necessary for a novation to take place. The Pakistani Court in its turn did not consider whether, in a case such as the one it was dealing with, tacit consent of the other parties could be said to have been given, and hence that novation had taken place.[1]

O'Connell, in his discussion of the question of State succession consequent upon the partition of British India, has observed:[2]

'The effect of the assignment of the treaty rights and obligations of British India to Pakistan, however, remains uncertain. In strict law it would seem that the consent of the other signatories to this novation of the contractual relationship would be essential, but whether or not this consent may be tacit and not express has not been finally determined. It is to be noted, however, that the Indo-United Kingdom Trade Agreement of 1939, for example, is regarded as in operation between Great Britain and Pakistan, while the Secretariat of the United Nations accepted Pakistan's declaration that it was a Party to the Conventions relating to Obscene Publications, and the Traffic in Women and Children, to which British India had been a Party, and did not object to its signing protocols which were only open to parties to these Conventions. If the express consent of each signatory were necessary to make the assignment effective, this latter practice would be inadmissible.'

The question of reciprocity within the scheme of implementing legislation does not appear to have been properly appreciated by either of the High Courts.

The Indian Court does not appear to have considered at all that aspect of the matter despite the reference to the statement in Halsbury that no Order in Council had yet been passed in England declaring India to be a party to the Convention, so that it was doubtful whether an Indian award would be enforced in England. The Indian Court might well have declined to consider this question on the ground that the scheme of the implementing legislation intended that the question whether another state had made reciprocal arrangements or not was to be determined by the Executive, and the Executive having notified that a certain State had made reciprocal arrangements, the Court would accept that statement and not proceed further to examine whether in fact the State in question did have reciprocal arrangements or not. The Indian Court may then have held that the original Indian Notification of 1938, having been preserved in India, this was sufficient for it to hold that the reciprocal arrangements for the enforcement of Indian awards did exist in England, and hence an English award was enforceable in India.

The Pakistani Court, however, was perhaps too bold in its approach to the question of reciprocity. For it held that the original Notification of 1938 was not sufficient to satisfy the Court that Pakistan was a party to the Convention or that reciprocal arrange-

[1] In Halsbury's *Laws of England* (3rd ed.), the view is expressed, presumably based on the view that tacit consent has been given by other parties, that India and Pakistan are effective participants in the Protocol and Convention. See vol. 2, p. 22, n. (*k*), and p. 52, n. (*q*). Also Czechoslovakia in a diplomatic note presented to the Government of Pakistan in May 1960 declares that it considers itself bound by the Convention *vis-à-vis* Pakistan. The Pakistan Government itself apparently considers Pakistan to be a party to the Convention as it has only in April 1960 notified that having satisfied itself that the Federal Republic of Germany has made arrangements for the enforcement of Pakistani awards, it was declaring Germany to be a party to the Convention, assuming all along that there can be no question that Pakistan was a party to the Convention.

[2] O'Connell, *The Law of State Succession* (1956), at pp. 42–43. Also see Oppenheim's *International Law* (8th ed.), § 84, at pp. 167–8.

ments had been made in England, for the enforcement of Pakistani awards. It proceeded to examine the position in international law, and as a result held that Pakistan was not a party to the Convention. It observed, therefore, that the Pakistani Act could not become operative until Pakistan actually became a party to the Protocol and Convention. It thereby indicated that whether Pakistan was a party to the Convention or not was a question which must be determined by the Court itself. Further, it examined the law of England and determined that no Order in Council having been made pursuant to Section 35 of the English Act in respect of Pakistan, a Pakistani award would not be enforceable in England. Hence, in the absence of reciprocity, it would not enforce an English award in Pakistan. The Pakistani Court thus arrogated to itself the power to determine whether reciprocal arrangements had been made by another State although the scheme of the implementing legislation indicates that such a determination is to be made by the Executive.

Parenthetically, it may be noted that in the English Act and in the Indian and Pakistani Acts the Executive is called upon to declare a State to be a 'Party to the Convention'. This is a question which may require determining fine points of international law, but it is, none the less, left to the Executive. It would seem that this is another instance where a court is bound by the declaration of the Executive, though the Pakistani Court did not consider itself so restricted.

Given the volume of trade between India, Pakistan and England and the not unusual provision in contracts between English, Pakistani and Indian traders for arbitration in England, the existing uncertainty in regard to the enforceability of arbitral awards as between the three countries is distinctly unfortunate. At the least, it seems desirable that new Orders in Council should be issued by Her Majesty's Government, and fresh notifications made by the Indian and Pakistani Governments, so as to remove the uncertainty to which attention has been drawn above. A more comprehensive and radical solution would, of course, be possible by abandoning the framework provided by the Geneva conventions for the new machinery provided by the Convention drafted under the auspices of the Economic and Social Council of the United Nations in 1958. With regard to that Convention, the President of the United Nations conference convened to adopt that Convention in 1958, observed that:

'it was already apparent that the document represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.'[1]

Whichever course is adopted the present uncertainty ought in the interests of the business communities of the three countries to be brought to an end as soon as possible.

KAMAL HOSSAIN

LEGAL PROBLEMS ARISING FROM THE DISSOLUTION OF THE MALI FEDERATION*

THE political problems resulting from the dissolution of the former Federation of Mali into the separate sovereign States of Senegal and Mali have demanded such immediate

[1] See Sultan, op. cit., at p. 816.

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attention that the interesting legal problems arising from the new situation have tended to escape notice. What, for example, is now the legal position of treaties made by the former Federation with third States? Before this and similar questions arising from the break-up of the Federation can be answered, it is necessary to ask a prior question: what was the legal position of the constituent States of the Federation, and was Senegal legally entitled to secede?

The former Mali Federation was composed of the Republic of Senegal and the Soudanese Republic, both former French colonies. On 20 August 1960 the Senegalese Assembly, after a series of political crises,[1] passed a decree annulling its participation in the Mali Federation and denying any further competence over it by the Federation.[2] The Government of Soudan immediately denied the lawfulness of this action, but the Government of Senegal claimed that its secession was legal on two grounds: first, that the component parts of the Federation had remained fully sovereign States, which thus possessed an inherent right of withdrawal from federation with each other; and second, that the constitution of the Mali Federation became automatically null and void (or alternatively, gave rise to a right of abrogation on the part of Senegal) upon breach of certain of its basic terms by the Government of Soudan.[3]

Under the French Constitution of 1958,[4] the Overseas Territories of France were given the opportunity of becoming members in the French Community. Voting 'oui' in the referendum, the peoples of Senegal and Soudan chose to remain tied to the Community. But whether in fact the Mali Federation was composed of two fully sovereign States is not entirely certain. The status provided for Senegal and Soudan by the French Constitution of 1958 was that of 'autonomous State'; and this term is used in contradistinction to 'independent' in the same document.[5] Certainly the French Community, and not the member States, possessed at that time jurisdiction over foreign policy and defence matters[6]—though far-reaching administrative powers were given to the member States themselves, and in Soudan and Senegal local governments were elected.[7] The desire among certain members of the Community—namely, Senegal, Soudan, Dahomey and Upper Volta—to form a federation within the Community was manifested as early as December 1958; and in January 1959 a Federal Constituent Assembly composed of representatives from the Assemblies of these States, met to draw up and adopt a Constitution for the Federation of Mali.[8] This

[1] Differences of opinion between the Sudanese and Senegalese were already apparent at the Constitutive Congress of the Party of African Federation in July 1959. These continued throughout the Executive committee meetings in September 1959, and were manifested again at the Inter-State Conference of April 1960. The final crisis was precipitated by the refusal of the Senegalese Minister of Defence of the Federation to countersign the appointment of the General Chief of Staff of the Army selected by the Soudanese Premier of the Government of the Federation.

[2] The political and social aspects of the rupture have been explored elsewhere. Full statements by both parties to the dispute are to be found in the *Revue de la Communauté France-Eurafrique*, No. 113, 2nd year (July–August 1960). See also *The Economist*, December 1960, p. 1039.

[3] The author wishes to express her thanks for information made available to her during interviews with M. Guy de Commines, Counsellor on African Affairs, French Embassy, Washington; and with Mr. Lamine Sall, Senegalese delegate to the United Nations.

[4] *Constitution Française*, adopted by referendum on 28 September 1958 and promulgated on 4 October 1958; Articles 76 and 86.

[5] Ibid., Articles 77 and 86.

[6] Article 78 provides: 'The Community's jurisdiction shall extend over foreign policy, defence, currency, common economic and financial policy, as well as over policy on strategic raw materials. . . .'

[7] As early as 1946 two deputies and three senators represented Senegal in Paris. Later *Conseils du Gouvernements* were set up in Soudan and Senegal, as well as legislative assemblies.

[8] *Constitution de la Fédération du Mali*, of 17 January 1959, adopted at Dakar.

Constitution was ultimately only ratified by the Legislative Assemblies of Soudan and Senegal;[1] and from April 1959 a Federal Assembly of Mali sat to prepare for federal elections.

It seems likely that the autonomous States of Senegal and Soudan achieved recognition of sovereignty and independence at the same time as did the Federation of Mali which they composed. For although the only formal proclamation and celebration of independence which took place was that of the Mali Federation itself, on 20 June 1960 negotiations for independence were conducted between the French Republic, on the one hand, and the Republics of Senegal and Soudan, on the other hand; and the agreements for the transfer of competence and the agreements defining the transitional provisions were signed not by the French Republic and the Mali Federation, but by the French Republic and the Republics of Senegal and Soudan.[2] There would seem, therefore, to be room for the view that the component parts of the Federation achieved sovereign status, as well as the Federation of Mali itself; and, indeed, this view is upheld by the terms of the Constitution of the Federation of Mali.[3]

This being so, may it now be argued—as it has been argued by the Government of Senegal—that a sovereign independent State may not be fettered against its will to a federation it wishes to leave? The answer must depend not only on the status of the parties, but on the nature of their union, and the contents and status of the instrument which embodies it. Traditional literature has not been very felicitous in providing consistent criteria of the differing natures of personal unions, real unions, federal States and confederated States. None the less, it may be said with certainty that the Mali Federation was not a personal union, for this term implies not only a shared monarch, but also that the Union itself is not an international person, international personality in this case remaining solely with the member States.[4] That the Federation of Mali was an international person in its own right is shown not only by the terms of the Constitution,[5] by its recognition as such by its former colonial parent,[6] but also by the recommendation by the Security Council of the United Nations for admission of the Federation to the United Nations.[7] Unlike the union between Jordan and Iraq, separate representation in the United Nations had not been requested. Nor, on the other hand, was it analogous with the fusion of Egypt and Syria at the formation of the United Arab Republic, for in that case single representation was requested because

[1] The Federal Constitution was ratified by the Legislative Assembly of Soudan of 21 January 1959; by the Legislative Assembly of Senegal on 22 January 1959; and by the Legislative Assembly of Upper Volta on 28 January 1959. Upper Volta subsequently adopted a national constitution on 28 February 1959 forbidding membership in any federal group and hence withdrew from the Federation. On 14 February 1959 the Legislative Assembly of Dahomey had refused to ratify the Federal Constitution, and so never became a member of the Mali Federation.

[2] *Accord Particulier portant transfert des compétences de la Communauté*, 4 April 1960, *Journal Officiel de la Communauté*, No. 7 (15 July 1960).

[3] The original Constitution of 17 January 1959 was modified by two laws, of 4 April and 22 April 1959 (Law Nos. 59–5), and again by Constitutional Law No. 60–11 of 18 June 1960.

[4] Oppenheim, *International Law*, vol. 1 (8th ed., by Lauterpacht), p. 171.

[5] 'La Souveraineté nationale appartient au peuple du Mali . . .', *Loi Constitutionelle*, No. 60–11, (18 June 1960); *Journal Officiel de la République Soudainaise*, 2nd year, No. 59 (15 July 1960).

[6] France officially recognized Senegal as an independent State on 11 September 1960 by virtue of a *communiqué* from the office of Premier Debré.

[7] On 28 June 1960. Subsequently, on 20 September 1960, the General Assembly declined to act on the pending application, and referred the matter back to the Security Council. The Security Council now had before it applications from the separate States of Senegal and Mali (as the Soudanese Republic had now been renamed). On 28 September 1960 it passed two resolutions recommending their admission (U.N. Docs. S/4543, S/4544), which were acted upon affirmatively by the General Assembly.

the personalities of the States involved had been extinguished.[1] There is a certain lack of clarity as to what constitutes a real union. The learned editors of Oppenheim have remained content with the explanation that a real union exists where two sovereign States are linked by an international treaty into a union which makes a single international person;[2] that a real union is not itself a State but only an international person; and that the component States are not separately international persons, although they are fully sovereign States.[3] The categorizing of subjects of international law in this formalistic manner must today be regarded as both unsophisticated and unhelpful. Certainty is no greater in the examples of real unions cited by jurists.[4] The fact that Mali itself is a State, however, would mean that the union was other than a real union. Certainly the Mali Federation did not represent a Confederation of States (*Staatenbund*),[5] for again a union of confederate States is not itself an international person; and further, its central organ has very limited powers.[6] There remains, in the traditional classification, the federal State. This is described as 'a State like the United States of America . . . where the separate members are in themselves distinct in legislative and executive power, but in which there is a central legislative and executive power, which alone represents the Federation for foreign purposes'.[7] There is general agreement that, in this system, both the Federal and the State Governments operate directly upon the people, thus making each citizen subject to two Governments. Provided that each Government is acting within its allotted sphere, that Government is not subordinate to any other.[8] The degree to which or the area in which the component States have given up their powers is irrelevant, and may vary from federal constitution to federal constitution.[9] What is essential is their sovereign equality in separate spheres.

[1] See Articles 1 and 58 of the Provisional Constitution of the United Arab Republic and comments thereon by Cotran, *International and Comparative Law Quarterly*, 8 (1959), p. 347.

[2] Oppenheim, op. cit., p. 171.

[3] Ibid. See also Huber, *Die Staatensukzession* (1898), p. 164, where he argues that the unions are merely cases of particularly closely united confederations. Keith, *Theory of State Succession* (1907), p. 93, asserts that for international law purposes the real union and the federal union are one, though there are certain differences from the public law point of view.

[4] Oppenheim, op. cit., p. 172, n. 3; Keith, op. cit., p. 93; and De Muralt, *State Succession* (1954), p. 88, all consider that Sweden–Norway between 1814 and 1905 was a real union. However, this view is not shared by Phillimore, *Commentaries upon International Law* (3rd ed.), vol. 1, para. 74, who maintains that it was a personal union; nor by Twiss, *The Law of Nations* (2nd ed.), vol. i, para. 40, who refers to it as a federal union. Other examples of real unions may be found in Austria–Hungary until 1918, and probably Denmark–Iceland between 1918 and 1944.

[5] The traditional example is the German Confederation between 1820 and 1866. A Diet was formed which could receive and accredit envoys and make treaties; but there was no common nationality or militia, and the several States also retained the right of receiving and accrediting ministers and of making treaties.

[6] See Keith, op. cit., p. 92; Oppenheim, op. cit., p. 173. [7] Keith, op. cit., p. 93.

[8] 'The essential point is not that the division of powers is made in such a way that the regional governments are the residuary legatees under the Constitution, but that the division is made in such a way that, whoever has the residue, neither general nor regional government is subordinate to the other.' Wheare, *Federal Government* (1946), p. 13. See also the definition of Sir Robert Garran in the *Report of the Royal Commission on the Australian Constitution* (1929): 'A form of government in which sovereign or political power is divided between the central and local governments, so that each of them within its own sphere is independent of the other' (p. 230). For a discussion of how far the Constitutions of the United States, Canada, Australia and South Africa are truly federal, see Wheare, op. cit., pp. 5–15.

[9] Oppenheim, op. cit., p. 176, where the editor asserts as fallacious the view that member States of a federation are automatically deprived of any international status. He points out that the member States of the Federal State of Germany, under the pre-World War I Constitution retained their competence to send and receive diplomatic envoys to and from foreign States.

The Constitution of the Mali Federation merits further consideration in the light of the above. The final version was adopted by the Federal Assembly on 18 June 1960.[1] It provided that the Federation had competence over foreign affairs and diplomatic representation; defence and external security; federal finance and economic policy; justice and external commerce. The rights reserved to the States are framed in the form of a residual clause.[2] The Federal Government may make treaties, though the federated States must pass the necessary laws for their enactment.[3] The Constitution is silent on whether any treaty-making power is reserved to the component States, and the rule of *expressio unius est exclusio alterius* may be relevant here. Both State and Federal systems of justice are provided for. Nor is the frequently used guide of nationality, as a pointer to the type of union, clearly defined in the Constitution.[4] However, it is significant that not only was it deemed necessary for the legislative assemblies of the federated States to ratify and adopt the Federal Constitution and its amendments, but it was the legislative assemblies which also authorized the transfer to the Federation of all the communal competencies.[5]

The Mali Federation, then, had all the characteristics of a Federal State, though the federated States retained their sovereign personality to a larger degree than has perhaps been usual in modern federations. The Government of Senegal in effect justified its secession from the Federation on the grounds that the personality of the component States was so distinctly maintained, and that the competence of the Federation was so markedly a voluntary concession by those States, that a right to secede must be implied. An additional argument of considerable interest is that the Federation was not a federation in the classical sense, but should rather be recognized as a *sui generis* union emanating from an application of international law to African needs.[6] African society being essentially tribal, and social, ethnic and economic differences being so pronounced,[7] federations henceforth formed in Africa, it is argued, must always be held to imply a right of secession. It is curious that no contention was made that secession from a federal union is a right normally available under international law. Certain authorities have expressed the view that a right to secede unilaterally is not necessarily inconsistent with the federal principle; they point to certain anomalies within the contemporary federal systems which logically are inconsistent with the principle of federalism, and yet which in fact do exist.[8] However, no right of secession is provided for in

[1] See p. 377, n. 3, above.

[2] 'Les États ont compétence en toutes matières non réservées à la Fédération par l'article précédent.' Article 6, Constitutional Law of 18 June 1960.

[3] Articles 55 and 58.

[4] There is merely a statement in Article 35 which provides that federal law will fix rules of nationality. The position is complicated by the fact of a common citizenship of the French Community, which is provided for by Article 77 of the French Constitution of 1958.

[5] See 'La vie Institutionelle et Juridique du Mali', *Bulletin de L'Afrique Noire*, No. 151 (5 July 1960). The transfer to the Mali Federation of competencies was approved by the Legislative Assembly of Senegal on 10 June 1960, and by the Legislative Assembly of Soudan on 7 June 1960.

[6] Leopold Senghor, the President of the Federal Assembly, in his press statement of 22 August 1960, said: 'The Federation of Mali was not a unified federation like most federations . . . but a decentralized federation. It was half-way between a classical federation and a confederation' (translation mine). *Revue de la Communauté France-Eurafrique*, No. 113, 2nd year (July–August 1960).

[7] These differences were especially pronounced in the case of Soudan and Senegal. Senegal was the smaller State (covering an area of 75,750 sq. m., with a population of 2,300,000, compared with Soudan's 443,200 sq. m., and population of 3,700,000), but very much the richer. Its colonial history and ties with France were both longer and closer, and the political structure of the two nations embodied very differing concepts of socialism and democracy.

[8] Thus Wheare, op. cit., p. 91, points out that the southern States in the American Union, especially South Carolina, asserted a right to nullify the laws of Congress, if they thought them

the federal constitutions of Australia and Canada,[1] and in the United States the combined weight of the Civil War and the Supreme Court supports this position.[2] Certainly there would seem to be strong grounds for suggesting that this principle should not be rejected in the new African federations—in spite of the attractiveness of the argument in favour of their *sui generis* character—as in politically immature nations a right to secede may well weaken effective intertribal government by placing a weapon of political coercion in the hands of regional governments, who may abuse it.

There remains under this head a final point worthy of comment. In the original Constitution of the Mali Federation, adopted on 17 January 1959, there was included a right of secession.[3] This right does not appear in the laws of 4 April and 22 April 1959 modifying the Constitution, nor in the final version of 18 June 1960. On the other hand, no contrary provision has been included. Now although the Constitution was not formally an international treaty, being adopted by representatives of sovereign States sitting in constituent assembly rather than as ambassadors (though in neither case would they have had the power to bind their Governments without ratification), it is in every way so analogous to a treaty that to apply rules of interpretation pertinent to the international law of treaties would seem fully justified. Reference to *travaux préparatoires* as an aid to interpretation commands a large body of support.[4] The fact that the right to secede was omitted from the amended Constitution is of especial interest in the light of the fact that the Upper Volta, which had initially been a member of the Federation in its pre-sovereign days, had peacably seceded from the Federation,[5] which may well lead to the assumption that the omission of the right in the Constitution of June 1960 was a provision against the recurrence of a similar event.

The Government of Senegal has defended its withdrawal from the Federation on grounds other than the right of secession; namely, that breaches by Sudanese Federal Government officers, of basic terms of the Constitution, had rendered the Constitution legally worthless. Whether this claim purports to espouse concepts of automatic voidness or of voidability has not been made very clear. Certainly it is an argument which encourages further analogy with the interpretation of treaties. It is well known that various differences of opinion had arisen between Mobido Keita, the Premier of Soudan and the acting President of the Federation, on the one hand, and Mama-

unsatisfactory, on the grounds that the general Government was the agent of the States and that the States were therefore entitled to nullify any act of their agent of which they disapproved. This doctrine is less consistent with federalism than a right of secession, which does not place the general Government in a subordinate position, but rather recognizes, as Wheare points out, that it is to be either co-ordinate with a State Government within the area of the State, or is to have no connexion with it.

[1] The only way in which States and provinces may secede from the Australian and Canadian federations appears to be through an act of the United Kingdom Parliament. Wheare, op. cit., p. 91, points out that in 1934 the State of Western Australia petitioned the United Kingdom Parliament to pass an act for its secession from the Commonwealth of Australia, without success.

[2] 'The Constitution in all its provisions looks to an indestructible union, composed of indestructible states.' *Per* Chase C.J., in *Texas* v. *White* (1868), 7 Wallace, 700 at p. 725.

[3] Constitution of 17 January 1959, Article 57.

[4] Both international law and British constitutional law provide authority for the use of *travaux préparatoires* in these circumstances. As to the former, it may be noted that in the *Ambatielos* case, the International Court of Justice, by reference to the preparatory work of the Declaration of 1926, accepted evidence that, although both parties eventually adopted a draft which omitted the word 'anterior', the Greek Government originally suggested a draft referring to anterior claims deriving from the Treaty of 1886: *I.C.J. Reports*, 1952, pp. 45, 63. As to English law, see Maxwell, *Interpretation of Statutes* (10th ed.), pp. 28–49.

[5] See p. 377, n. 1, above.

dou Dia (the Premier of Senegal and the acting Vice-President of the Federation) and Leopold Senghor (the Sudanese President of the Federal Assembly) on the other hand. The grievances complained of are too familiar to be repeated here.[1] The two breaches, however, which Senegal claims gave rise to a right of annulment of the Constitution on her part, were the dismissal of Dia from his post as Minister of Defence by Keita, and the failure to initiate preparations for the election of the President of the Federation which was to take place by 1 September 1960.[2] Certainly the dismissal of Keita appears to have been constitutionally invalid.[3] However, while it was apparent that elections would not take place by 1 September, the legal date for expiry of this clause had not yet passed at the time of Senegal's secession on 21 August. But quite apart from legal interpretations of the constitutional instrument involving the merits of the issue, the point remains: may one State, having made an international constitutional instrument with another State, declare itself no longer bound by that instrument if the other party is in breach of it, or of parts of it? The position of the Senegal Government finds some support in the statement of *Vattel*[4] that the refusal to execute particular articles of a treaty is held to be an abrogation of the whole treaty, at the discretion of the injured party. There is authority for stating that such abrogation is not automatic, but rather gives the injured party the option to abrogate—the right is one of voidability.[5] It may be contended, as with any other point of treaty interpretation, that the question must be judged *in contextu* with the aims of the treaty; and it would first seem necessary to discover a violation of the *object* of the treaty before an option to abrogate can be said to arise.[6] In other words, violation by one party of *any* term in a treaty gives rise to remedies other than discharge from further obligations under the treaty: only violation of an essential term gives rise to this right.[7] The non-election of a President of the Federation may probably be deemed a breach of an essential term—the more so when the role of the presidency in the structural formation of the Federation is examined.[8] We would doubt more the categorization of an illegal dismissal of a minister as a breach striking at the very purpose of the instrument.[9] However, it should be added that the whole distinction between essential and non-essential terms has met with much difference of opinion, and whereas State

[1] The interested reader will find a full statement of all complaints, legal and political, by both parties in the *Revue de la Communauté France-Eurafrique*, No. 113, 2nd year (July–August 1960).

[2] Article 71 of the Constitution of 18 June 1960.

[3] Under Article 12 the President of the Federal Government names and dismisses Cabinet members. However, it also provides that an end may not be put to any of the functions of ministers until after consultation with the national delegation of the minister concerned. No such consultation took place.

[4] Vattel, l. 4, c. 4, s. 46.

[5] See the report of the King's advocate of 6 April 1825, regarding a breach by Spain of certain articles in the Treaties of Peace. Cited in McNair, *Law of Treaties*, pp. 493–5.

[6] See the Report of the Queen's Advocate of 27 January 1847 denying on these grounds a right of abrogation caused by an alleged violation by Russia of the Congress Treaty of Vienna of 1815 by becoming a party with Austria and Prussia to a Convention of 1846 for the incorporation into the Empire of Austria of the Free City of Cracow. Ibid., p. 449.

[7] Ibid., p. 508; especially the opinion of Twiss of 29 October 1868 on breaches of certain clauses in a slavery convention by the Transvaal Republic.

[8] Section 2 of the Mali Constitution, Articles VII–XII, gives the President of the Federation very extensive powers, including the naming of a Council of Ministers, of ambassadors, the right to promulgate laws and the role of arbitrator between the federated States.

[9] The article dealing with the dismissal of ministers may well be interpreted as an entirely independent stipulation, on the adherence to which the carrying out of the other articles is in no way conditional. For the possibility of this situation, see McNair, op. cit., p. 513, with reference to a claim by Guatemala of breach of certain articles of the Convention of 1859 by Great Britain.

practice reveals the drawing of this distinction—invariably for reasons of policy as much as any other—it has met with less favour in the writings of jurists.[1] Since in this particular case the only breach of what could objectively be considered an essential term—the election of a President of the Federation—was a breach of omission rather than commission, and could be rectified at any stage, there would seem to be good grounds for regarding the claims of the Senegal Government under this particular head as unconvincing.

The dissolution of the Mali Federation, however, is now a *fait accompli*,[2] and discussion on the legality of secession by one party must appear a trifle academic. On the other hand, some problems of a very real nature remain, the most important of which concerns the legal status, in the present circumstances, of the treaties of co-operation made between France and the Mali Federation in April 1960.[3] Have Senegal and the Republic of Mali (as the Soudanese Republic has now been renamed) succeeded to the rights and obligations of these treaties? The question is of some importance, as the Accords, which are seven in number,[4] include one on mutual defence, under which the Federation of Mali ceded to France six strategic military bases, three of which are in Senegal, and three in the former Soudan. The control allowed to France over these areas, together with rights of land, sea and air passage to and from them, was very extensive.[5] The Republic of Mali has unequivocally repudiated the agreements, declaring that it has succeeded to neither rights nor obligations thereunder, as the Accords were made by the Federation. It appears that French forces remain stationed at the ceded bases in Mali Republic territory, but the Government has reserved its right to demand their withdrawal at any time. The announcement of a political union of the Republic of Mali with Guinea and Ghana may make such a demand more imminent than France had initially anticipated.[6] The position of Senegal on the continued efficacy of the agreements has been more equivocal: its Government has issued no formal statement as to its position on the matter, nor has it formally reserved its position. Armed forces of the French Community remain on the Senegalese bases ceded under the treaties, and no request for their withdrawal is expected.

Is there State succession of treaties of this kind where a federation of the nature of Mali has ceased to exist? In the matter of treaty succession, two points are relevant: first, the type of treaty involved; and second, the type of change in statehood which has given rise to the problem of succession. The Accords made between Paris and the Mali Federation may be categorized as 'personal' rather than 'real' or 'dispositive'. Although the rights ceded to France in the matter of military bases are extensive, there

[1] McNair, op. cit., p. 515; Oppenheim, op. cit., p. 947; cf. Hall, *A Treatise of International Law* (8th ed.), p. 409; and Hyde, *International Law, Chiefly as Interpreted by the United States*, vol. 2, para. 546.

[2] Mali and Senegal are now separate Members of the United Nations; recognition has been granted to each by France, the United States, Nigeria and the Republic of China, *inter alia*.

[3] These Accords were signed on 22 June 1960 and approved for France by Law No. 60–682 of 18 July 1960, and for the Mali Federation by Law No. 60–73 of 20 June 1960. They are published in the *Journal Officiel de la Communauté*, No. 8, 2nd year (15 August 1960).

[4] Agreement for the participation of the Mali Federation in the Community; Agreement for co-operation in Foreign Affairs; Agreement for co-operation in Defence; Agreement for economic and financial co-operation; Agreement for co-operation on advanced learning; and Agreement for co-operation on Civil Aviation; Agreement for the transfer of authority.

[5] Annex III, Article 1 of the Defence Agreement provides that the named bases are 'ceded', and that the French army has free use of them. Under Article 3 the French Army is allowed free use of ports, rivers, roads and airspace. Freedom of movement of military materials is guaranteed in Article 5.

[6] Since this was written the demand has been made: *New York Times*, 22 January 1961.

is no evidence of any intention to create rights *in rem*. Nor must the personal relationship between France and former colonies now independent within the framework of the French community be underestimated. The treaties fall, prima facie, into two groups—political and commercial. Most writers are agreed that there is no succession to the former type of treaty.[1] There is less agreement as to whether treaties concerning commerce and the juridical and administrative order survive upon the extinction of the contracting State, though the majority of writers answer this question in the negative, on the grounds of the impossibility of distinguishing these from political considerations.[2]

However, there is much to be said for approaching the problem of succession from a different point of view—namely, the particular change in condition of the contracting party which has given rise to a successor State. 'The fact of the personality of a State is the key to the answer'.[3] The split-up of the Mali Federation into the sovereign States of Senegal and Mali resembles closely a classical case of dismemberment. However, in the classical concept of dismemberment, new States reappear in the place of the old State. In this case, no new States have appeared, but rather there has been reversion to a fully sovereign status of the component States. As we have pointed out above, both Soudan and Senegal achieved full independence and sovereignty at the same time as did the Mali Federation; and every care was taken to preserve their separate identity and status under international law after they entered the Federation. Indeed, Senegal's position has been based throughout on the continued existence of its sovereign personality.[4] It has been stated: 'The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of state succession, but rather a matter of treaty law and interpretation. A personal treaty is fundamentally a contract, and therefore dependent on the continued existence of the parties.'[5] On broader grounds, there is support for the view that the dissolution of a real union does not terminate treaty obligations.[6] Similarly, there is authority for the proposition that in the dissolution of a union of a federal or confederate character, its treaty obligations remain binding on the constituent parts into which it is dissolved.[7] It would therefore seem, *a fortiori*, that where the personality of a State emerging from the dismemberment was already identifiable during the federation, it remains bound by treaties concluded by the federation. This obviously applies to the case under discussion. Further, under the terms of the Constitution it was provided that 'No international commitment may

[1] Oppenheim, op. cit., p. 159; Castren, 'La Succession d'États', *Recueil des Cours*, 1 (1951), p. 435. [2] Castren, ibid.; Huber, op. cit., p. 153. [3] Hall, op. cit., p. 114.

[4] The case of the dissolution of the real union of Sweden and Norway in 1905 is instructive in this context. Both of these States delivered Notes to foreign powers to the effect that treaties made by the Union would continue to bind them both, save for treaties made specifically for one member, which would continue to bind that State only. *British Foreign and State Papers*, 98 (1905), p. 833. Commenting on this, De Muralt, op. cit., states that this conclusion was inevitable as 'this case does not concern the birth of two new states, but the separation of two already existing states, which each started a political life of their own, though juridically they were already separate entities' (p. 88). [5] O'Connell, *The Law of State Succession*, p. 15.

[6] The classical illustrations, other than that of Sweden–Norway in 1905, are Austria–Hungary in 1919 and Denmark–Iceland in 1944. See Mervyn Jones, 'State Succession in the Matter of Treaties', in this *Year Book*, 26 (1947), p. 368.

[7] Here we refer to the case of the dissolution of Gran Columbia in 1830 into three independent States of New Granada, Equador and Venezuela. Its treaty obligations with Great Britain devolved upon these States (McNair, op. cit., p. 412); and it is cited for the general principle that States resulting from dismemberment are bound by treaties concluded prior to the dissolution by O'Connell, op. cit., p. 86 and by Jenks 'State Succession in Respect of Law Making Treaties', in this *Year Book*, 29 (1952), p. 126.

reflect on the competence of a federated state without its consent',[1] and the passing of laws necessary for the effective enactment of treaty provisions was in the hands of the component States.[2] If Soudan and Senegal were willing to accept the terms of the treaties as component parts of the Federation, may it not be argued that the Federation contracted for them and on their behalf? Moreover, the political realist may perhaps be permitted to wonder whether, had the agreements been made between France and the separate States of Soudan and Senegal, their terms would not have been virtually the same as those made by the Federation—for the bargaining position of France to obtain the military concessions she required was very strong, by virtue of her role as ex-colonial power and leader of the French Community. This being so, there is every reason to deduce that the consent of the component States, as well as the Federation itself, was given to the treaties; and that their international personality being so clearly maintained, they succeed to the Federation of Mali not with a 'clean slate' but with the rights and obligations of these treaties. The military provisions of the treaties are clearly related to specifically local areas; and this fact adds a 'local character' to this particular treaty,[3] and a further reason for its devolution.

So far France has not pressed the arguments which would appear to be available to it. There is reason to believe that this fact stems not only from what may presently be judged to be political expedient, but also a certain cynicism as to how much it would avail.

'Nous savons bien qu'ils avaient fait naguère entre eux une Constitution, mais nous savons aussi ce que valent les Constitutions: nous en avons fait dix-sept depuis cinquante ans et la nature des choses est plus forte que les textes constitutionels arrêtés par les hommes politiques.'[4]

ROSALYN COHEN

THE UNITED NATIONS INTERNATIONAL LAW COMMISSION: A GUIDE TO THE DOCUMENTS, 1949–59*

THE working of the International Law Commission during its first ten years is reviewed in an article by Shabtai Rosenne which appears earlier in this *Year Book*. During this period the Commission completed and presented to the General Assembly fifteen pieces of work, of which ten are draft codes or conventions, together with detailed commentaries thereon, and five are reports on topics specially referred to the Commission by the Assembly. The studies and discussions on which these drafts and these reports are based have comparatively recently been made available in printed volumes under the title *Yearbook of the International Law Commission*. Each *Yearbook* except the first is in two volumes, vol. 1 containing the summary records of the session, vol. 2 the documents (reports, memoranda, &c.) presented to the Commission, as well as the Commission's report to the General Assembly. The *Yearbook* for the 1st session contains both records and documents in one volume Under General Assembly Resolution 987 (10th session, 1955) the issues of the *Yearbook* from 1949 to 1955 contain docu-

* © J. Higham, 1961.

[1] Article 55 of the Constitution of 18 June 1960 (translation mine).

[2] Article 58, ibid.

[3] Namely, Cap Vert (Dakar–Thiès), Saint-Louis and Kati in Senegal, and Bamako, Gao and Tessalit in Soudan.

[4] Statement by General de Gaulle at Press Conference of 5 September 1960 reported in *Revue de la Communauté France-Eurafrique*, No. 113, 2nd year (July–August, 1960), at p. 11.

ments in the original language (English, French or Spanish) without translation, and summary records of the discussions in English only. From 1956 onwards, however, the *Yearbook* appears in separate English, French and Spanish editions.

This *Yearbook* of the Commission greatly eases the task of the student. Previously, the documents of the Commission were available for the most part only in mimeographed form: they thus remained walled up in the mass of mimeographed documents issued by the United Nations. Only the annual Report to the General Assembly (which contains the drafts agreed upon by the Commission) was regularly printed and put on sale in the five official languages of the United Nations—English, French, Spanish, Russian and Chinese. Nevertheless, the student of a particular topic may still spend a good deal of time working through the printed volumes to find his material and may encounter certain difficulties in the process. It is the aim of the present Note to provide him with a guide to enable him to find what he is searching for amongst the Commission's now voluminous records.

The *Yearbook* does not contain all the documents of the session—some remain available only in the mimeographed form. Moreover, for the sessions before that of 1956, the language of the document (the original, without translation) may prove a stumbling block. In the mimeographed form most documents appeared in English, French and Spanish and some were also reproduced in Russian.

Libraries possessing the original mimeographed documents should not therefore lightly discard them now that the printed volumes have appeared. The Commissions' documents are numbered in accordance with the system in use for all U.N. documents: each bears the Commission's particular symbol, A/CN4/—, followed by a serial number, or in some cases, by a letter or letters and a serial number. The letters thus preceding, in some cases, the serial number, are L., W., or SR. These denote respectively *Limited* (i.e. given limited distribution), *Working Paper*, and *Summary Record* (no verbatim records are issued). For most printed, as distinct from mimeographed, documents, the U.N. Sales Number system is used, either instead of or in addition to the A/CN4/— system. An example is 1948.V.1, in which the year of publication is followed by the Roman numeral V, denoting the subject group 'Law', and a serial number.

Libraries fortunate enough to possess complete sets of the Commission's documents will therefore have no difficulty in arranging the material by these symbols. For mimeographed documents they provide an arrangement by category—Main series, Limited series, Working Paper series and Summary Records—within which the arrangement will be chronological, by session. This is the arrangement in use in the United Nations Library, Geneva, and the one felt to be the most convenient to maintain. With this arrangement, however, an index is necessary.

The U.N. catalogue of publications[1] lists, with a subject index, all U.N. publications printed and placed on sale. For mimeographed documents, recourse must be had to the monthly *United Nations Documents Index*, January 1950– , with monthly and annual subject indexes. This *Index*, though valuable for its inclusiveness, is for that very reason a somewhat time-consuming tool to use for spotting and linking the documents of any particular organ. It does not, nor could it, set out to provide an historical guide to work done in any particular field. Yet such a guide, or guides, would surely be useful to research workers, if only as the thread was useful to Theseus. What follows is offered as such a guide to the documents of the International Law Commission.

[1] *Ten Years of United Nations Publications, 1945–55: A Complete Catalogue* (New York, 1955). (Sales No. 1955.I.8). This is kept up to date by *United Nations Publications, 1955–* (New York, 1956–), an annual publication which does not bear a sales number.

Every document prepared for the Commission, with the single exception of sessional agenda, has been listed, though no attempt has been made to analyse their contents. The material is arranged by session under the headings of the topics considered by the Commission. In one or two instances other headings have also been used, to bring out material which may be of interest. Given the session, the appropriate *Yearbook* can be turned up. However, the official document symbol is also indicated, so that the series of mimeographed documents may be consulted where the *Yearbook* is not available or does not contain the document required. References are also given to the meetings of the Commission at which the various topics were discussed.

Abbreviations used are:

GA Res.	General Assembly Resolution.
GAOR	General Assembly Official Records. This is followed by the Assembly session, in Roman numerals, and by the supplement number, in Arabic numerals.
ILC	International Law Commission.

In certain instances, action outside the International Law Commission, by the General Assembly or the Secretary-General, has been indicated, with reference to the main documents. This has been done only where it has seemed necessary to give a reasonably complete account of the work done.

Detailed references to the already published issues of the *Yearbook* are as follows:

1st session, 1949:	Sales no.		1957.V.1
2nd session, 1950:	,,	,,	1957.V.3
3rd session, 1951:	,,	,,	1957.V.6
4th session, 1952:	,,	,,	58.V.5
5th session, 1953:	,,	,,	59.V.4
6th session, 1954:	,,	,,	59.V.7
7th session, 1955:	,,	,,	60.V.3
8th session, 1956:	,,	,,	1956.V.3
9th session, 1957:	,,	,,	1957.V.5
10th session, 1958:	,,	,,	58.V.1
11th session, 1959:	,,	,,	59.V.1

AGGRESSION, DEFINITION OF

Considered by ILC under GA Res. 378(V)B, 1950.

3rd session, 1951

Spiropoulos *Report*	A/CN4/44, chap. II
Amado memorandum	A/CN4/L.6
Alfaro memorandum	A/CN4/L.8
Scelle memorandum	A/CN4/L.19
Discussion in ILC	92nd–96th meetings

General Assembly action

Secretariat report	A/2211 (1952)
1953 Special Committee report	A/2638 (GAOR.IX.11) 1954
Government comments	A/2689 (1954)
1956 Special Committee report	A/3574 (GAOR.XII.16) 1957
Government comments	A/AC.91/1 (1959)
1957 Special Committee report	A/AC.91/2 (1959)

AMERICAS—CO-OPERATION

See INTER-AMERICAN COUNCIL OF JURISTS

ARBITRAL PROCEDURE

Selected by ILC at its 1st session, 1949.

1st session, 1949	
Discussion in ILC	6th–7th, 33rd meetings
2nd session, 1950	
Scelle *Report*	A/CN4/18
Government laws, &c.	A/CN4/19, pt IB
Secretariat bibliography	A/CN4/29
Secretariat memorandum	A/CN4/35
Secretariat memorandum on Soviet doctrine	A/CN4/36
Discussion in ILC	70th, 72nd–73rd meetings
3rd session, 1951	
Scelle *2nd Report*	A/CN4/46
No discussion in ILC	
4th session, 1952	
Scelle supplementary note	A/CN4/57
Scelle draft code and commentary	A/CN4/L.35, 37
Lauterpacht text	A/CN4/L.36
Draft code	A/CN4/59
Discussion in ILC	137th–156th, 173rd–177th, 179th–182nd meetings
5th session, 1953	
Secretariat commentary	A/CN4/L.40
Government comments	A/CN4/68
Discussion in ILC	185th–194th meetings
7th session, 1955	
Secretariat 2nd commentary	A/CN4/92 (1955.V.1)
No discussion in ILC	
9th session, 1957	
Scelle *3rd Report*	A/CN4/109
Government comments	A/2899 (1955)
Discussion in ILC	404th, 417th–422nd meetings
10th session, 1958	
Scelle *Draft*	A/CN4/113
Survey of 6th Committee views at GA (X) 1955	A/CN4/L.71
Discussion in ILC	433rd–448th, 450th meetings
Final model rules	A/3859 (GAOR.XIII.9) 1958

CIUDAD TRUJILLO RESOLUTION, 1956

See INTER-AMERICAN COUNCIL OF JURISTS

CODIFICATION OF INTERNATIONAL LAW

Considered under Statute

1st session, 1949

Survey of international law in relation to the work of codification	A/CN4/1 (1948.V.1)
Discussion in ILC	2nd–7th meetings

CONSULAR INTERCOURSE: *see also* DIPLOMATIC INTERCOURSE

Selected by ILC at its 1st session, 1949

7th session, 1955

Discussion in ILC	327th, 330th meetings

8th session, 1956

Discussion in ILC	373rd–374th meetings

9th session, 1957

Zourek *Report*	A/CN4/108
No discussion in ILC	

10th session, 1958

Discussion in ILC	468th–470th meetings

11th session, 1959

Draft articles	A/4169 (GAOR.XIV.9)
Discussion in ILC	496th–499th, 505th–511th, 513th–514th, 516th–518th meetings

CONTINENTAL SHELF: *see also* TERRITORIAL SEA

Under *Law of the Sea*, selected by ILC at its 1st session, 1949

2nd session, 1950

François *Report on High Seas*	A/CN4/17, para. 22
Government replies	A/CN4/19, pt. IC
Secretariat memorandum	A/CN4/32, sect. III
Discussion in ILC	66th–69th meetings

3rd session, 1951

François *2nd Report on High Seas*	A/CN4/42, para. 11
Draft articles	A/CN4/L.27; A/1858 (GAOR.VI.9)
Draft articles and commentary	A/CN4/49
Discussion in ILC	113th–117th, 123rd meetings

4th session, 1952

Government comments	A/CN4/55

No discussion in ILC

5th session, 1953

François *4th Report on High Seas*	A/CN4/60
Government comments	A/CN4/70; A/2456 (GAOR.VIII.9)
Draft articles	A/2456 (GAOR.VIII.9)

No discussion in ILC

6th session, 1954

Denmark: comments	A/CN4/86

No discussion in ILC

8th session, 1956

François *Report on High Seas*	A/CN4/97, sect. IV
Draft articles and commentary	A/3159 (GAOR.XI.9)
Discussion in ILC	357th–361st meetings

For continuation see the papers of the *Conference on the Law of the Sea, 1958*

CRIMINAL JURISDICTION, INTERNATIONAL

Considered by ILC under GA Res. 260 (III)B, 1948

1st session, 1949

Secretariat memorandum	A/CN4/7 (1949.V.8)
Discussion in ILC	30th meeting

2nd session, 1950

Alfaro *Report*	A/CN4/15
Sandström *Report*	A/CN4/20
Secretariat bibliography	A/CN4/28
Discussion in ILC	41st–44th meetings

General Assembly action:

1951 Committee *Report*	A/AC.48/4 (A/2136; GAOR.VII.11)
Government comments	A/2186
1953 Committee *Report*	A/AC.65/L.13 (A.2645; GAOR.IX.12)

Consideration deferred under GA Res. 898(IX), 1954 and GA Res. 1187(XII), 1957

CUSTOMARY INTERNATIONAL LAW, WAYS AND MEANS OF MAKING KNOWN

Selected under Statute

1st session, 1949

Secretariat memorandum	A/CN4/6 (1949.V.6)
Secretariat working paper	A/CN4/W.9
Discussion in ILC	31st–32nd meetings

2nd session, 1950

Hudson working paper	A/CN4/16
Secretariat comments	A/CN4/27
Discussion in ILC	40th meeting

3rd session, 1951

Discussion in ILC	124th meeting

7th session, 1955

Resolution of ILC	A/2934 (GAOR.X.9) p. 23

General Assembly action

Secretariat Report, 1951	A/1934
Secretariat Report, 1952	A/2170
Secretariat Report, 1955	A/C.6/348
Secretariat Report, 1959	A/4151

DIPLOMATIC INTERCOURSE: *see also* CONSULAR INTERCOURSE

Selected by ILC at its 1st session, 1949
Also relevant: GA Res. 685(VII), 1952

6th session, 1954

Discussion in ILC	270th, 279th meetings

7th session, 1955

Sandström *Report*	A/CN4/91
No discussion in ILC	

8th session, 1956

Secretariat memorandum	A/CN4/98
No discussion in ILC	

9th session, 1957

Discussion in ILC	383rd–413th meetings

10th session, 1958

Government comments	A/CN4/114
Secretariat summary of 6th Committee views	A/CN4/L.72
Government opinions	A/CN4/L.75
Sandström *Report* and Government opinions	A/CN4/116
Discussion in ILC	448th–449th, 451st–468th meetings

FISHERIES: *see also* CONTINENTAL SHELF; HIGH SEAS; TERRITORIAL SEA

Comments of inter-governmental organizations	A/CN4/100

HIGH SEAS

Selected by ILC at its 1st session, 1949

2nd session, 1950	
François *Report*	A/CN4/17
Government replies	A/CN4/19, pt. IC
Secretariat bibliography	A/CN4/26
Secretariat memorandum	A/CN4/30; A/CN4/32
Secretariat memorandum on Soviet doctrine and practice	A/CN4/38
Discussion in ILC	63rd–69th meetings
3rd session, 1951	
François *2nd Report*	A/CN4/42
Discussion in ILC	113th–125th meetings
4th session, 1952	
François *3rd Report*	A/CN4/51
Government comments	A/CN4/55
Discussion in ILC	178th meeting
5th session, 1953	
François *4th Report*	A/CN4/60
François *5th Report*	A/CN4/69
Discussion in ILC	195th–210th, 215th meetings
6th session, 1954	
François *6th Report*	A/CN4/79
No discussion in ILC	
7th session, 1955	
Draft articles	A/2934 (GAOR.X.9)
Discussion in ILC	283rd–286th, 288th–298th, 300th–306th, 320th–321st, 323rd meetings
8th session, 1956	
François *7th Report*	A/CN4/97
Government replies and rapporteur's conclusions	A/CN4/97Add 1–3
Government comments	A/CN4/99
Inter-governmental organizations' comments	A/CN4/100
François *Supplementary report*	A/CN4/103
Discussion in ILC	333rd–361st, 364th meetings

For continuation see the papers of the *Conference on the Law of the Sea, 1958*

IMMUNITIES

See CONSULAR INTERCOURSE
DIPLOMATIC INTERCOURSE

INTER-AMERICAN COUNCIL OF JURISTS

Secretariat report on 3rd Meeting, Mexico City, 1956 — A/CN4/102

INTERNATIONAL LAW COMMISSION, STATUTE

GA Res. 174(II), 1947

Amended by GA Res. 484(V), 1950; 485(V), 1950; 600(VI), 1951; 984(X), 1955; 985(X), 1955; 986(X), 1955; 1103(XI), 1956

1st session, 1949

Statute and GA Resolutions relating to ILC — A/CN4/4 (1949.V.5)

No discussion in ILC

3rd session, 1951

Discussion in ILC — 83rd, 96th–97th, 112th–113th meetings

INTERNATIONAL LAW ORGANIZATIONS

See ORGANIZATIONS CONCERNED WITH INTERNATIONAL LAW

INTERNATIONAL RESPONSIBILITY

See STATE RESPONSIBILITY

MEXICO CITY DECLARATION, 1956

See INTER-AMERICAN COUNCIL OF JURISTS

NATIONALITY, INCLUDING STATELESSNESS

Selected by ILC at its 1st session, 1949

Also relevant: Economic and Social Council Resolutions 304D(XI), 1950; 319B III (XI), 1950

3rd session, 1951

Secretariat note — A/CN4/47

Discussion in ILC — 124th meeting

4th session, 1952

Hudson *Report* — A/CN4/50

Secretariat *Reports* — E/1112; A/CN4/56 (E/2230)

Discussion in ILC — 156th–163rd, 172nd, 181st meetings

5th session, 1953

Córdova *Report* — A/CN4/64

Extracts from Kaeckenbeck, G. *The international experiment of Upper Silesia*, 1942. — A/CN4/65

Kerno memoranda	A/CN4/66; A/CN4/67
Córdova *2nd Report*	A/CN4/75
Draft articles	A/2456 (GAOR.VIII.9)
Discussion in ILC	211th–225th, 231st–234th, 237th meetings

6th session, 1954

Córdova *3rd Report*	A/CN4/81
Government comments	A/CN4/82
Córdova *Report on multiple nationality*	A/CN4/83
Secretariat *Report on multiple nationality*	A/CN4/84
Secretariat: *Laws concerning nationality*	1954.V.1
Draft articles	A/2693 (GAOR.IX.9)
Discussion in ILC	242nd–252nd, 271st, 273rd–276th meetings

NATIONALITY OF MARRIED WOMEN

Selected under Economic and Social Council Resolution 304D (XI), 1950, transmitted in A/CN4/33

2nd session, 1950

Discussion in ILC	71st meeting

3rd session, 1951

Discussion in ILC	85th meeting

4th session, 1952

Secretariat report	E/CN6/126 Rev.1 (E/CN6/129 Rev.1; 1950.IV.12)
Discussion in ILC	156th–163rd, 172nd, 181st meetings
Secretariat study	E/CN6/254 (1955.IV.1)

NUREMBERG PRINCIPLES

ILC instructed to formulate principles by GA Res. 177 (II), 1947

1st session, 1949

Secretariat memorandum: *Charter and Judgment of the Nürnberg Tribunal: history and analysis*	A/CN4/5 (1949.V.7)
Shawcross statement	A/CN4/12
François, Sandström, Spiropoulos working paper	A/CN4/W.6
François, Sandström, Spiropoulos working paper, 2nd draft	A/CN4/W.12
Discussion in ILC	17th, 25th–29th, 31st meetings

2nd session, 1950

Spiropoulos *Report*	A/CN4/22
Principles	A/CN4/L.2; A/1316 (GAOR.V.12)
Discussion in ILC	44th–49th meetings

3rd session, 1951

Government comments	A/CN4/45
No discussion in ILC	

OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Considered under GA Res. 177(II), 1947

1st session, 1949

Discussion in ILC	29th–30th meetings

2nd session, 1950

Government replies	A/CN4/19
Spiropoulos *Report*	A/CN4/25
Pella memorandum	A/CN4/39
Discussion in ILC	54th–62nd, 72nd meetings

3rd session, 1951

Spiropoulos *2nd Report*	A/CN4/44
Discussion in ILC	89th–92nd, 106th–111th meetings

5th session, 1953

Secretariat note	A/CN4/72
Discussion in ILC	235th meeting

6th session, 1954

Spiropoulos *3rd Report*	A/CN4/85
Discussion in ILC	266th–271st, 276th meetings

ORGANIZATION OF AMERICAN STATES

See INTER-AMERICAN COUNCIL OF JURISTS

ORGANIZATIONS CONCERNED WITH INTERNATIONAL LAW

Lists of organizations	A/CN4/8; A/CN4/14
Revised list	A/CN4/24

POLITICAL ASYLUM

Considered under Rights and Duties of States

1st session, 1949

Discussion in ILC	16th, 20th, 32nd–33rd meetings

PRIVILEGES

See CONSULAR INTERCOURSE
DIPLOMATIC INTERCOURSE

RESERVATIONS TO MULTILATERAL CONVENTIONS: *see also* TREATIES

Selected under GA Res. 478(V), 1950

3rd session, 1951

Brierly *Report*	A/CN4/41
Amado memorandum	A/CN4/L.9
Scelle memorandum	A/CN4/L.14
Discussion in ILC	100th–106th meetings

RIGHTS AND DUTIES OF STATES

Selected under GA Res. 178(II), 1947

1st session, 1949

Secretariat study	A/CN4/2 (1949.V.4)
Secretariat study, contents of appendices	A/CN4/2 Add. 1
Secretariat paper	A/CN4/11
Discussion in ILC	8th–16th, 19th–25th, 29th–30th meetings

SEA

See CONTINENTAL SHELF
FISHERIES
HIGH SEAS
TERRITORIAL SEA

STATE RESPONSIBILITY

Selected under GA Res. 799(VIII), 1953

6th session, 1954

Garcia-Amador memorandum	A/CN4/80
No discussion in ILC	

7th session, 1955

Discussion in ILC	315th meeting

8th session, 1956

Garcia-Amador *Report*	A/CN4/96
Discussion in ILC	370th–373rd meetings

9th session, 1957

Garcia-Amador *2nd Report*	A/CN4/106
Discussion in ILC	413th–416th, 418th meetings

10th session, 1958

Garcia-Amador *3rd Report*	A/CN4/111
No discussion in ILC	

11th session, 1959

Garcia-Amador *4th Report*	A/CN4/119
Discussion in ILC	512th–513th meetings

STATELESSNESS

See NATIONALITY, INCLUDING STATELESSNESS

TERRITORIAL SEA: *see also* CONTINENTAL SHELF

Selected under GA Res. 374(IV), 1949

2nd session, 1950	
Discussion in ILC	71st meeting
4th session, 1952	
François *Report*	A/CN4/53
Discussion in ILC	164th–172nd meetings
5th session, 1953	
François *2nd Report*	A/CN4/61
Government observations	A/CN4/71
François *3rd Report*	A/CN4/77
No discussion in ILC	
6th session, 1954	
Discussion in ILC	252nd–265th, 271st–273rd, 277th–279th meetings
7th session, 1955	
Government comments	A/CN4/90
Amendments to the draft . . .	A/CN4/93
Secretariat working paper	A/CN4/L.54
Discussion in ILC	295th, 299th, 306th–320th, 324th–325th meetings
8th session, 1956	
François *Report*	A/CN4/97
Government replies and rapporteur's conclusions	A/CN4/97 Add 1–3
Government comments	A/CN4/99
Inter-governmental organizations' comments	A/CN4/100
Discussion in ILC	333rd–335th, 361st–368th meetings

For continuation see the papers of the *Conference on the Law of the Sea, 1958*

TREATIES: *see also* RESERVATIONS TO MULTILATERAL CONVENTIONS

Selected by ILC at its 1st session, 1949

2nd session, 1950	
Government replies	A/CN4/19, pt. A
Brierly *Report*	A/CN4/23
Secretariat bibliography	A/CN4/31 (1952.V.4 Annex)
Secretariat memorandum on Soviet doctrine and practice	A/CN4/37
Discussion in ILC	49th–53rd meetings

3rd session, 1951	
Brierly *2nd Report*	A/CN4/43
Discussion in ILC	84th–88th, 98th–100th meetings
4th session, 1952	
Brierly *3rd Report*	A/CN4/54
Discussion in ILC	178th–179th meetings
5th session, 1953	
Lauterpacht *Report*	A/CN4/63
Yepes memorandum	A/CN4/L.46
Discussion in ILC	227th meeting
6th session, 1954	
Lauterpacht *2nd Report*	A/CN4/87
No discussion in ILC	
7th session, 1955	
Secretariat working paper	A/CN4/L.55
No discussion in ILC	
8th session, 1956	
Fitzmaurice *Report*	A/CN4/101
Discussion in ILC	368th–370th meetings
9th session, 1957	
Fitzmaurice *2nd Report*	A/CN4/107
No discussion in ILC	
10th session, 1958	
Fitzmaurice *3rd Report*	A/CN4/115
No discussion in ILC	
11th session, 1959	
Fitzmaurice *4th Report*	A/CN4/120
Discussion in ILC	480th–496th, 500th–504th meetings

J. Higham

DECISIONS OF BRITISH COURTS DURING 1959–60 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law*

Immunity from civil jurisdiction of member of Commonwealth and its High Commissioner —counterclaim

Case No. 1. High Commissioner for India and Others v. *Ghosh*, [1959] 3 W.L.R. 811, C.A.; [1959] 3 All E.R. 659, C.A. The plaintiffs in this action were the High Commissioner for India, the Union of India and the Government of West Bengal. They sued the defendant for the return of money lent or, alternatively, for damages for breach of contract. The defendant counterclaimed damages for slander against the first two plaintiffs, and this counterclaim had, on the application of these plaintiffs, been struck out by order of McNair J., in chambers; the defendant then appealed against this order, appearing in person before the Court of Appeal.

In delivering his judgment (in which Morris L.J. and Ormerod L.J. concurred) Jenkins L.J. stated:

'The law which we have to apply is, I apprehend, well settled. A person entitled to diplomatic immunity, as the High Commissioner for India indisputably is, or a foreign sovereign state, as for this purpose the Union of India admittedly is, cannot be impleaded in the courts of this country in an action such as the plaintiffs' counterclaim in respect of slander . . . it is quite manifest that the subject of the defendant's counterclaim could not have been maintained against the High Commissioner for India and the Union of India as an original action.'

His Lordship conceded that, in initiating the action, the plaintiffs had waived their immunity to a certain extent; they had submitted to the jurisdiction 'not only for the purpose of having their claim adjudicated on, but also for the purpose of enabling the defendant . . . to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim'. His Lordship continued, however, that this rule did not permit any and every counterclaim. Having cited two passages from the *Annual Practice*[1] and the case of *South African Republic* v. *Compagnie France-Belge du Chemin de Fer du Nord*[2] he stated:

'I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. . . . The counterclaim clearly could not be maintained by independent action, and it is equally clear in my opinion that it cannot be brought into the present litigation on the ground that it is necessary to adjudicate on the claims for slander in order to do justice on the claim in debt.'

Accordingly the appeal was dismissed.

This case needs little comment. Indeed, except for the explanation that the defendant appeared in person, it is surprising that it was ever brought. So far as the entitlement

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[1] Ed. of 1959, p. 311, in a note to R.S.C., Ord. 16, r. 1 and p. 508, in the note to R.S.C., Ord. 21, r. 17 (the notes are repeated in the 1960 ed. at pp. 311 and 508 respectively).

[2] [1898] 1 Ch. 190.

to immunity is concerned, the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, provides in s. 1 (1) (*a*) that:

'A person for the time being recognised by Her Majesty's Government in the United Kingdom as the chief representative in the United Kingdom of any country to which this section applies, whether he is known by the title of High Commissioner for that country or by any other title . . . shall be entitled to the like immunity from suit and legal process, and the like inviolability of residence, official premises and official activities as are accorded to the envoy of a foreign sovereign power accredited to Her Majesty.'

By s. 1 (6) this section was applied to India, so that the problem was to be treated according to the ordinary rules governing diplomatic immunities. Under these rules it has long been recognized that, by instituting an action, the plaintiff waives his immunity only so far as a set-off or counterclaim is in the nature of a defence to the original action or is otherwise so related to and dependent on the subject-matter of the action as to make it necessary to deal with it in order to do justice between the parties.[1] The position before courts in the United States is similar; for example, in *U.S.* v. *National City Bank of New York*[2] the Court was prepared to entertain only 'a set-off or counterclaim properly assertable as a defense in a similar suit between private litigants . . .'. It may also be noted that in the Draft Articles on Diplomatic Intercourse and Immunities adopted by the International Law Commission at its Tenth Session in 1958,[3] paragraph 6 of the commentary to Article 30 (dealing with waiver of immunity) states:

'. . . the initiation of proceeding by a diplomatic agent precludes him from invoking immunity in respect of counter-claims directly connected with the principal claim. In such a case the diplomatic agent is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.'

Statute in conflict with pre-existing Treaty

Case No. 2. Inland Revenue Commissioners v. *Collco Dealings Ltd.*, [1959] 3 All E.R. 351; [1960] 2 W.L.R. 848 C.A. This case came before Vaisey J. by way of case stated by the Special Commissioners of Income Tax. Collco Dealings Ltd., a company registered and resident in Eire and not resident in the United Kingdom, bought the entire ordinary share capital of two English companies and in 1957 received dividends on this share capital, such dividends being paid from profits made before the acquisition by C. Ltd. The dividends were paid less U.K. tax and C. Ltd. sought to recover this tax under s. 349 of, and Part 1 of Schedule 18 to, the Income Tax Act, 1952; this set out the agreement made between the United Kingdom and the Republic of Ireland on 14 April 1926 which afforded absolute exemption from U.K. tax to residents of Eire not resident in Great Britain or Northern Ireland in respect of properties in or profits arising in Great Britain or Northern Ireland.

The Crown contended, however, that this exemption had been removed by subsequent Act, the Finance (No. 2) Act, 1955, in the case of 'dividend stripping'; the relevant section, s. 4 (2), applied to 'a person entitled under any enactment to an exemption from income tax . . .', and the Crown contended that that phrase must include C. Ltd.

The Special Commissioners had agreed that the phrase was wide enough to include

[1] *Brunswick* v. *King of Hanover* (1844), 6 Beav. 1; *Union of Russian Soviet Socialist Republics* v. *Belaiew* (1925), 42 T.L.R. 21.

[2] 83 F (2d) 236 at p. 238.

[3] A/3859. This draft, incidentally, is to be the basis of or the work of a codification conference, convened by the United Nations in Vienna in August 1961.

C. Ltd. (or any person benefiting under the exemption in the 1952 Act), but thought that a limited construction must be placed on the phrase for two reasons. The first was that an Act ought not to be construed so as to impose the will of Parliament on persons outside the jurisdiction; and the second was that it should not be construed so as to involve a breach of a treaty with another country.

At first instance Vaisey J. held that the words of the section were 'absolutely unambiguous' and must therefore be given their literal (and consequently wide) meaning. Citing Maxwell on *Interpretation of Statutes* (10th ed., 1953), p. 148, where the rule is stated that 'if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law', he stated:

> 'I hold that, as the statute is unambiguous, its provisions must be followed even if they are contrary to international law—or, I may add, any international treaty or arrangement.'

In the Court of Appeal this decision was affirmed unanimously. However, Lord Evershed M.R., adduced from the 1926 agreement yet another reason for this decision. He cited Article 8 of the Agreement which states that 'this agreement shall be subject to confirmation by the British Parliament . . . and shall have effect only if and so long as legislation confirming the agreement is in force in both countries'. From this he argued that '. . . its effect and continued effect depended, and was expressed to depend, upon confirmation by the legislatures of the two countries, so that the agreement itself contemplated on its face that either side might at some time, if they thought fit, by the exercise of their sovereign legislative power put an end to it'.

This case certainly presents no new principle. It is, of course, true that English courts will, in the event of an ambiguity in an Act, strive for an interpretation which does not conflict with international law, whether customary or conventional; the Privy Council has stated that 'in construing legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law'.[1] But the ruling that the Act is unambiguous precludes any resort to presumptions of that kind as an aid in construction. Nor does the case really raise the issue of whether international law is part of the law of England. It may be noted that even in countries like the United States where treaties become the 'supreme law' of the land,[2] or France where treaties override earlier legislation, a legislative enactment overrides the provisions of earlier treaties.[3] The principle applied is *lex posterior derogat priori*, and this principle applies whether the law first in time is a statute or a treaty which, either by statute or constitutional provision, is given parity of effect with statute.

The only remarkable feature of this case is the excursion by the Master of the Rolls into the domain of treaty interpretation. Article 8 of the 1926 Agreement would seem to contemplate ratification by the Parliaments of both contracting parties and, almost like a condition of reciprocity, adds as a condition of its continuing validity the requirement that legislation confirming the agreement should remain in force in both countries. To suggest, as the Master of the Rolls does, that such a provision contemplates and even entitles either party to put an end to the treaty by legislative action, at any time, goes far beyond any reasonable construction of that provision. The insertion of a reciprocity clause in a treaty would not be taken to exempt from international responsibility the party which, by legislative action, unilaterally terminated or rendered impossible of performance its treaty obligations.

[1] *Committee on Japanese Canadians* v. *A.G. for Canada*, [1947] A.C. 87 at p. 104.
[2] Article 6 of the Constitution.
[3] See *Whitney* v. *Robertson* (1887), 124 U.S. 190.

Extradition—meaning of 'territory' in Extradition Treaty—locus standi *of requesting State*

Case No. 3. Regina v. *Governor of Brixton Prison, Ex parte Minervini*, [1959] 1 Q.B. 155. The applicant was an Italian seaman accused of the murder of another seaman on board a Norwegian vessel who, on the arrival of the vessel at a British port, had been committed to prison to await extradition to Norway. He applied for a writ of habeas corpus.

The Extradition Treaty of 1873 between Norway and Great Britain provided in s. 1 that:

'The high contracting parties engage to deliver up to each other persons who, being accused . . . of a crime committed on the territory of the one party, shall be found within the territory of the other party. . . .'

The applicant accordingly contended that it had not been proved that the vessel was, at the time of the offence, within Norwegian territory or territorial waters and that a vessel could not be deemed 'territory'. Alternatively, even if the term 'territory' were deemed to include a vessel flying the flag of the State in question, this could not be the case where the vessel was in the territorial waters of a third State, for it could not be assumed that Parliament could legislate (i.e. under the Extradition Act, 1870) for matters taking place in another State's territory. The Extradition Act 1870, s. 25, provided that:

'For the purposes of this Act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign State.'

Lord Parker C.J., in a judgment in which Cassels and Streatfield JJ. concurred, pointed out that Article 2 of the Treaty, listing the crimes for which extradition could be granted, included such matters as 'sinking or destroying a vessel at sea . . .' (para. 16), 'assaults on board a ship on the high seas . . .' (para. 17), 'revolt . . . on the high seas against the Master of the vessel (para. 18). He concluded, therefore, that:

'this Treaty is not treating "territory" in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of this Treaty'.

Moreover, so far as the applicant contended that the Treaty must be construed strictly and could not be enlarged by the Act, the Lord Chief Justice held that in construing the Treaty he was entitled to look at the Act.[1] He was not impressed by the argument that the Act could not provide for situations where the vessel was in the territorial waters of a third State (although it was never proved or stated exactly where the vessel was), since the possibility of concurrent jurisdictions existing over the crime was common enough. Accordingly he held that the magistrate had jurisdiction to make the committal order.

The other question which arose was as to the *locus standi* of the foreign government requesting extradition. The applicant referred to a decision by Piggot C.J. in *In re Li Yu Mui*[2] as authority for the proposition that the Government requesting extradition had no *locus standi* before the Court. Counsel for the Norwegian Government pointed

[1] The converse situation had arisen in *The Queen* v. *Wilson* (1877), 3 Q.B.D. 42 where the Act was construed in the light of the Treaty with Switzerland.

[2] (1910), 5 Hong Kong L.R. 227.

out that such a view was contrary to the practice of English courts. Without deciding this as a matter of principle, the Lord Chief Justice held that:

'We think that under R.S.C. ord. 59, r. 17, the Court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court can have the benefit of their view.'

He accordingly heard counsel for the Norwegian Government.

In commenting on this case, and to take the preliminary point of the *locus standi* of the requesting Government first, it is obviously desirable in practice to hear that Government if it so wishes. There may well arise questions which the requesting Government is specially competent to answer; the obvious example is whether the 'crime' is a crime under the law of the requesting State. Clearly such answers or argument would not be conclusive for the English Court, but it must be allowed to receive them. The present case affords another example, for it would surely have been open to the Norwegian Government to prove the exact location of the vessel, had the English Court taken a more restricted view of the interpretation of the term 'territory'.

So far as the substantive point is concerned, the case points to the desirability of inserting in treaties a term more coextensive with real jurisdiction, or else including a definition of 'territory' which would make it coextensive. It may be noted that the Convention on Extradition concluded between the United States and other American Republics at Montevideo in 1933 provides for surrender where 'the demanding State (has) the jurisdiction to try and punish the delinquency which is attributed to the individual'. The essential function of extradition is to make effective the jurisdiction of a State in circumstances where it lacks the physical custody over the individual. From this it follows that provision should be made for offences committed on board vessels wherever they may be; s. 16 of the Extradition Act certainly provides for this and it would be as well that the treaties did also.

The fact that the Lord Chief Justice was prepared to give a wide meaning to the term 'territory' in the Treaty meant that the case no longer presented the problem of a conflict between the Treaty and the Act. It might be useful, however, to refer to two earlier cases where such a conflict did appear. In *The Queen* v. *Wilson*[1] a Treaty of 1874 with Switzerland provided that 'no Swiss . . . and no subject of the United Kingdom shall be delivered up . . .'; the Act contained no such limitation. The committing magistrate had taken the view that only the Act concerned him; the Treaty was a matter between the Governments. Cockburn C.J. regretfully held that, since the Treaty was by those terms mandatory and not discretionary, and since the Act must be read subject to the Treaty, the British subject accused by Switzerland could not be surrendered. The subjection of the Act to the Treaty is provided for in the Act (admittedly in a way which leaves a good deal to be desired) in that, under s. 6, the liability of a fugitive criminal from a State to be apprehended exists only where the Act applies to that State; this, in turn, depends on whether an Order-in-Council has been made under s. 2, and this may 'limit the operation of the order . . . and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient'. It follows, therefore, that s. 2 really means not only 'where this Act applies in the case of a foreign State . . .', but also *to the extent to which it applies*. The Treaty can, therefore, limit the operation of the Act but not extend it. In the later case of *In re Galwey*[2] a similar question arose but the 1872 Treaty with Belgium had been revised in 1887 (presumably because of the *Wilson* judgment) so that the exclusion clause then read 'in no case . . . shall the high contracting parties be bound to surrender their own

[1] (1877), 3 Q.B.D. 42.

[2] [1896] 1 Q.B. 230.

subjects'. Lord Russell C.J., with Wright and Kennedy JJ. concurring, approved *The Queen* v. *Wilson* but thought the change in wording significant in that the matter was no longer mandatory but vested a discretion in the executive; the courts had, therefore, power to make the committal order where the executive exercised the discretion against the individual.

The position would now seem to be, therefore, that resort to the treaty may be had in construing the Act, but the treaty can only limit the operation of the Act and not extend it; on the other hand (as the present case shows) resort to the Act may be had in construing a treaty.

Extradition—Interpretation of the Extradition Act by reference to the Treaty

Case No. 4. R. v. *Governor of Brixton Prison and Others, Ex parte Caborn-Waterfield*, [1960] 2 W.L.R. 792; [1960] 2 Q.B. 498; [1960] 2 All E.R. 178, D.C. In January 1954 the applicant had been summoned to appear before a French Court to answer a charge of theft; he did not appear and in his absence was convicted and sentenced to a four-year term of imprisonment in a *jugement par défaut*. The applicant gave notice to the French Court to have the judgment set aside, but again failed to appear and the Court then confirmed the conviction and sentence by a *jugement itératif défaut*. The effect of such a judgment (as previously examined by Lord Chelmsford L.C. in *In re Coppin*[1] was that, if surrendered to France, the individual would go straight to prison without any retrial: this was in contrast to a *jugement par défaut* or an *arrêt de contumace* when a retrial is heard after surrender.

When, in January 1960, the applicant was arrested in England on a warrant issued under the Extradition Act, 1870, and at the request of the French authorities, the warrant described the applicant as 'suspected and accused of the commission of the crime of larceny within the jurisdiction of the Government of France'. The Extradition Act, s. 10, provides separately for (and thus distinguishes between) fugitive criminals 'accused of' an extraditable crime and 'alleged to have been convicted of' an extraditable crime. In s. 26 of the Act it is further stated that '. . . the terms "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted of contumacy'. There also existed in the Treaty between France and the United Kingdom of 1876, Article VII (*c*) which ordered that:

> 'Persons convicted by judgment in default or arrêt de contumace shall be in the matter of extradition considered as persons accused, and, as such, surrendered.'

The question arose, therefore, whether the warrant for the arrest of applicant was irregular in that it described him as an 'accused' person instead of a 'convicted' person, and the applicant challenged the warrant by applying for a writ of habeas corpus. A further ground for the challenge was that the French conviction offended against English notions of substantial justice. Salmon J., reading the judgment of a court which included Lord Parker C.J. and Ashworth J., held that the effect of a *jugement itératif défaut* was that the person was a 'convicted' person within the meaning of s. 10 of the Extradition Act and not an 'accused' person as he would be in the case of a *jugement par défaut* on a conviction *par contumace*. In so far as the respondent sought to invoke Article VII (*c*) of the Treaty and argue that 'persons convicted by judgment in *défaut*' includes persons convicted by a *jugement itératif défaut*, thereby making such persons 'accused', the Court held that this was not a correct construction of the Treaty. Moreover, even

[1] (1866), 2 Ch. App. Cas. 47.

if it were, it would not avail the respondents since the Treaty could only be prayed in aid in the event of ambiguity, and then only to limit the scope of the Act, not to extend it (the Court here cited *R.* v. *Wilson*).

The Court therefore found it unnecessary to consider the question whether, in proceedings under the Extradition Act, it was bound to accept proof of the conviction as such or had the right to refuse to recognize such convictions as were secured by means which offended against English notions of justice; the Court was satisfied, in any event, that the French proceedings did not. Accordingly the applicant succeeded and was discharged.

In commenting on this case it may be observed that the Court dealt with the issue raised in the comment on the previous case, namely, the extent to which an English court will look at the treaty in construing the Act. The only difficulty lies in the apparent suggestion by Salmon J. that resort to the treaty can only be had where ambiguity is apparent in the Act; he says: 'Were there any ambiguity in the Act it might be possible to look at the treaty in order to resolve the ambiguity'. From what has been said in the comment on the previous case it should be apparent that the treaty may limit the operation of the Act, so that the treaty should be examined in each and every case, not merely where ambiguity exists in the Act.

N. Rhodesian Protectorate—Whether habeas corpus will issue in the territory

Case No. 5. Ex parte Mwenya, [1959] 3 W.L.R. 509; [1959] 3 W.L.R. 767 C.A. Mwenya, a native of Northern Rhodesia, was the subject of two restriction orders made on 15 June and 5 October 1957 by the Governor of N. Rhodesia under powers stemming from the Emergency Powers Regulations of N. Rhodesia, 1956, which in turn rested on the authority conferred upon the Governor by an Order in Council made under the Foreign Jurisdiction Act of 1890.

Mwenya applied to the Divisional Court for a writ of habeas corpus, the respondents being the Secretary of State for the Colonies, the Governor of N. Rhodesia and the District Commissioner for the district in which M. was detained (or rather to which he was restricted).

It was conceded by all parties that N. Rhodesia was a 'protectorate' and not a 'colony or foreign dominion of the Crown' within the meaning of s. 1 of the Habeas Corpus Act, 1862,[1] so that no question of the exclusion of the writ by that Act arose.

The question that did arise was a novel one, namely, whether the writ could be issued in a protectorate. Whereas the principle was clear that the writ would issue to any of the territorial dominions of the Crown (except where excluded under the 1862 Act), what was not clear was whether N. Rhodesia could be termed a 'territorial dominion' or alternatively, whether the scope of the writ was somewhat wider than 'territorial dominions'. The applicant relied on *obiter dicta* by Vaughan Williams L.J. and Farewell L.J. in *Ex parte Sekgome*[2] to the effect that, except where, as in that case, the detention was authorized by proclamation made under the Foreign Jurisdiction

[1] This section provided: 'No writ of habeas corpus shall issue out of England by authority of any judge or court of justice therein into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ and to ensure the due execution thereof throughout such colony or dominion.' This Act was passed in order to implement the grants of separate jurisdiction made to colonies and dominions after an English court had decided, in *Ex parte Anderson* (1861), 3 E. & E. 487, that it could issue the writ in Canada.

[2] [1910] 2 K.B. 576 at pp. 608, 618; the proclamations amounted to an abrogation of the writ of habeas corpus, as distinct from the Act of 1862 which excludes its issue from an English court.

Act of 1890, the writ would lie in a country governed by laws created under an Act of Parliament, whether or not the country had been annexed. On the other hand, Cassels J., in *In re Ning Yi-Ching*[1] had ruled that the British Concession at Tientsin was foreign territory and the writ would not lie in respect of a foreigner there.

So far as the 'status' of the Protectorate was concerned, the Secretary of State for Colonies had by affidavit stated that:

'The North Rhodesian Protectorate is a foreign country within which Her Majesty has power and jurisdiction. . . . The territory of the said Protectorate is a foreign territory under Her Majesty's protection. . . .'

In the Divisional Court (Lord Parker C.J., Slade and Winn JJ.), the Lord Chief Justice, giving the judgment of the Court, regarded the views expressed in previous cases as so conflicting that it was necessary to consider the matter by reference to first principles. The principles which appealed to the Court were that habeas corpus was a prerogative writ, a manifestation of the sovereignty of the Crown, and since the concept of sovereignty is essentially a territorial one the writ would only issue throughout the Sovereign's dominions in the territorial sense. Northern Rhodesia, though under the dominion of the Crown, was not part of its 'territorial dominions' and the writ would not therefore lie.

In the Court of Appeal argument was confined to this same preliminary point. Lord Evershed M.R. pointed out that the word 'protectorate' had no recognized or precise meaning, and was somewhat disturbed by the fact that in the evidence before the Court there was no detail whatever 'in the sense that it does not appear at all what were the treaties or other arrangements made or with whom, nor does it appear what is, in fact, the extent of the power or jurisdiction internally exercised in Northern Rhodesia by or on behalf of the Crown, or the Crown and Parliament'. His uneasiness, as he explained, arose because of:

'. . . the point which I think should be decisive of any case of this kind—namely, that the question should not be determined by reference merely to the fact that the country in question bears the label "protectorate", but must, or at least may, depend on the extent to which the Crown (as the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs) of the country to the exclusion of any other, or other effective, jurisdiction.'

He regarded the Lord Chief Justice's concept of the indivisibility of sovereignty as somewhat Austinian and preferred to emphasize the varying natures of Protectorates. He considered that the sovereignty of the Crown over N. Rhodesia was indistinguishable in legal effect from that exercised over territory acquired by conquest; moreover, he failed to find any principle by which the Court of Queen's Bench could be debarred from issuing the writ in favour of a British citizen,[2] and therefore allowed the appeal.

Romer L.J. agreed. He regarded it as anomalous that the writ would issue in a colony (if such colony had no effective courts of its own and therefore fell outside the Habeas Corpus Act, 1862) yet not in territory such as N. Rhodesia and could find no authority to exclude the writ. Sellers L.J. similarly agreed and rejected the notion that the distinction between a protectorate and a colony had the effect of barring the writ in the former.[3]

[1] (1939), 56 T.L.R. 3.

[2] The Court had been asked to assume that Mwenya was a British subject.

[3] But see *Sobhuza II* v. *Miller*, [1926] A.C. 518 where the Protectorate of Swaziland had been ruled a 'foreign' country to the extent that legislation by Order in Council under the Foreign Jurisdiction Act, 1890, or as an Act of State, could not be questioned by an English court.

If comment is confined to such aspects of the case as are of relevance in the field of public international law, then the interesting feature of this case become the readiness of the Court of Appeal to make their own decision as to the extent of the jurisdiction exercised over the territory by H.M. Government. In the present case their Lordships expressed some dissatisfaction at not being supplied with any detailed evidence on that point; Romer L.J. specifically referred to the argument by counsel for the Secretary of State that the Court cannot inquire into the degree of sovereignty which has been achieved in the Protectorate, but continued: 'He cited no authority . . . in support of that proposition and I can find no foundation for it in principle.' If one looks at the Foreign Jurisdiction Act, 1890, s. 4 (1) provides:

'If in any proceeding, civil or criminal, in a court . . . held under the authority of Her Majesty any question arises as to the existence or extent of any jurisdiction of Her Majesty in a foreign country, a Secretary of State shall, on the application of the court, send . . . his decision on the question, and his decision shall for the purposes of the proceedings be final.'

It may well be that the Court took the view that the affidavit of the Secretary of State did not embody any 'decision' as to the extent of the jurisdiction exercised in the territory, though this is not mentioned as the reason for their wish to make their own decision; in any event the judgments do go rather too far in asserting an independence in such matters which the Act denies to them. What the case amounts to, then, is that, except when precluded by a 'decision' under the Act, the courts will ascertain the extent of the jurisdiction exercised over a territory generally termed a 'Protectorate', and that if that jurisdiction corresponds more or less to the jurisdiction exercised over a colony, the writ will issue. There may well be, therefore, further cases in which the courts venture into this twilight zone of 'foreign territory' which is not truly 'foreign'.

Bahrain—Crown's jurisdiction to extend Colonial Prisoners Removal Act, 1869, to Bahrain

Case No. 6. Abdul Rahman Baker v. *Robert Edmund Alford and Another*, [1960] 3 W.L.R. 121. This case came before the Judicial Committee of the Privy Council on appeal from the Supreme Court of St. Helena.

The applicant, a subject either of the Ruler of Bahrain or of Qatar and resident in Bahrain, had taken part in a political disturbance and had been tried and convicted of, *inter alia*, attempted assassination of the Ruler of Bahrain by a special court set up by the Ruler and sentenced to fourteen years imprisonment. The Ruler apparently entertained some anxiety at the prospect of keeping the applicant (and his fellow conspirators) in Bahrain and, through his Adviser, inquired from H.M. Political Resident in the Persian Gulf whether H.M. Government would accept the prisoners for custody in a British possession. This inquiry was made prior to their actual conviction.

The Colonial Prisoners Removal Act 1869, s. 4, provided for the removal of prisoners under sentence from one colony to another where an agreement between the colonies to that effect exists and has been sanctioned by Her Majesty.

On 19 December 1956 two Orders in Council were made. The first, the Bahrain (Removal of Prisoners) Order[1] extended the 1869 Act to Bahrain; the second, the Prisoners Removal (Bahrain and St. Helena) Order[2] sanctioned the entry into an agreement by the Ruler of Bahrain and the Governor of St. Helena for the purposes of the Act. An agreement was then made and the prisoners removed by a British frigate to St. Helena. The applicant then applied for a writ of habeas corpus.

[1] S. I, 1956, No. 2031. [2] S. I, 1956, No. 2032.

The applicant's principal contention was that Her Majesty had no ju extend the 1869 Act to Bahrain, on the ground that the Act dealt with 'co Bahrain was not a colony. The Privy Council addressed to the Foreign Secret questions:

'(1) Did Her Majesty on 19 December, 1956, hold, exercise and enjoy legislative jurisdiction in Bahrain over persons being subjects of the Ruler of Bahrain and/or Qatar?'

'(2) If so, at what date did Her Majesty acquire such jurisdiction and what was its extent?'

The Secretary of State gave his answers by letter, and the final paragraph of that letter stated as follows:

'On 18th December, 1956, Her Majesty also acquired legislative jurisdiction in Bahrain to extend the Colonial Prisoners Removal Act, 1869, to Bahrain and to exercise the powers conferred on Her by that Act in relation, *inter alia*, to subjects of the Ruler of Bahrain and to subjects of the Ruler of Qatar. On 19th December, 1956, Her Majesty exercised that jurisdiction by making the Bahrain (Removal of Prisoners) Order, 1956, and the Prisoners Removal (Bahrain and St. Helena) Order, 1956.'[1]

The opinion of their Lordships, after reciting these answers, was that:

'Having regard to the language of section 4 of the Act of 1890, it is clear that these answers must be taken as finally deciding the questions raised for the purposes of the present proceedings.'

Their Lordships also rejected the applicant's contention that the reference to prisoners 'under sentence' in the Act of 1869 applied only to those sentenced by British courts and could not include prisoners sentenced by a special court of the Ruler. They likewise rejected the argument that there was no 'agreement' between the Ruler and the Governor of St. Helena which could be sanctioned by Her Majesty under the 1869 Act. They took the view that the two separate documents, the one a dispatch from the Governor to the Secretary of State for Colonies dated 24 December 1956, and the other the document headed 'Agreement' and executed by the Ruler on 26 December 1956, could together constitute a sufficient agreement, even though in general terms and not entering into matters of administrative detail.

The main interest of this case lies in the way in which their Lordships accepted without question the answers of the Secretary of State on the essential question in dispute, namely, the question of jurisdiction to extend the Act of 1869 to a territory which had never been conceived as a 'colony'. This interpretation of s. 4 of the Foreign Jurisdiction Act, 1890, is to be contrasted with the attitude of the Court of Appeal in the *Mwenya* case commented upon above. Seemingly, if the Secretary of State chooses to decide the very point at issue, the Privy Council takes the view that there is an end to the matter; there could be no scope for the kind of independent inquiry which the Court of Appeal appeared to contemplate in the *Mwenya* case.

In concluding, it is proper to add that this case has occasioned some adverse comment in the press in England. Some of the features which commentators found disturbing, for example the facts that the negotiations for removal were begun before any conviction had occurred, that the 'special court' of the Ruler was by its composition not likely to afford a guarantee of impartiality, and that the warrant for arrest under which the prisoners were delivered to the captain of the warship was dated two days before the Sanction Order was published (although not executed until afterwards), were not regarded by the Privy Council as affecting the legality of the action taken. That may

[1] The full text of these answers is set out at pp. 131–2 of the report.

It it is perhaps a pity that a court such as the Judicial Committee of the cil, with its peculiar historical origins, should not find it fit to express some about the manner of the exercise of the Crown's jurisdiction. Things were too well organized, and rather too early, to enable one to leave this case feeling surely comfortable. D. W. BOWETT

B. PRIVATE INTERNATIONAL LAW*

Proof of foreign law

Case No. 1. The English practice relating to proof of foreign law appears to be settled. Dicey's Rule 205 generalizes thus

'(1) In any case to which, in accordance with this Digest, foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means. (2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.'[1]

In several major respects this starkly simple English approach can be unsatisfactory. It is not suggested that the recent Privy Council decision in *Callwood* v. *Callwood*[2] is open to criticism on this score, but it does perhaps provoke reconsideration of some of the problems which present themselves at this meeting-point of the law of evidence and private international law.

The appeal in *Callwood* v. *Callwood* arose out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands. The two rival claimants were the plaintiff (respondent), the widow of a testator who had died in 1917, and the defendant (appellant), the only son of the plaintiff and the testator. The testator married the plaintiff in 1905 and it was common ground that at the time of his marriage and thereafter down to his death he was domiciled in the Danish Island of St. Thomas. It was also common ground that the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses movable property wherever situate and immovable property situate in St. Thomas. Although St. Thomas was ceded by Denmark to the United States in 1917, Danish law remained in force there until 1921. By a joint will of the testator and the plaintiff the latter was given the right, if she survived the testator, of retaining their joint estate undivided with their children. The British Great Thatch Island was (to use a neutral term) vested in the testator at the time of his death. In 1948 the defendant was granted a lease of the island by a man purporting to be agent for the plaintiff. This lease was admittedly invalid as not having satisfied certain legal formalities, but the defendant remained in possession. The plaintiff thereupon brought the present action claiming a declaration that by virtue of the joint will the island was her property. The defendant pleaded that Danish community of property law did not extend to foreign immovables, and that, therefore, the joint will was ineffective so far as it related to Great Thatch Island which accordingly devolved upon him as heir at law. The only evidence of Danish community of property law, which was given by affidavit by an attorney practising in the Island of St. Thomas, was to the effect that the law as stated in the opinion of a court in the United States of America on a question between the same parties was 'the law on this question'. This evidence was accepted by the trial judge in the Supreme Court of the Windward Islands and Leeward Islands and the defendant was ordered to give possession of Great Thatch Island to the plaintiff and to pay damages. The Federal Supreme Court of the West Indies affirmed this decision.

* © P. B. Carter, 1961.

[1] Dicey, *Conflict of Laws*, 7th ed., p. 1107.

[2] [1960] A.C. 659.

The defendant, as appellant to the Privy Council, relied primarily on the submission that there was no evidence upon which it could be properly held that, as a matter of Danish law, the property to which the system of community of property attached on the marriage of the testator and the respondent-plaintiff included Great Thatch Island, situated as it was in British territory and subject to English law. The Privy Council upheld this submission and accordingly advised that the appeal be allowed.

Their Lordships refrained from deciding 'the difficult question' as to whether, if there had been adequate proof that the Danish system of community of property extended to foreign immovables,

> 'it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution of Great Thatch Island otherwise than by applying the lex situs (i.e. English law).'[1]

The now respectably antique but perhaps still not entirely palatable doctrine of *Chiwell* v. *Carlyon*[2] is not therefore shaken by *Callwood* v. *Callwood*.

The onus of proving Danish law was upon the respondent. She failed to satisfy this onus and the appellant therefore succeeded as heir at law under English law. This result accords with traditional doctrine that the party relying upon foreign law must prove it and in the absence of such proof resort is had to English domestic law. This latter proposition is sometimes put in terms of a legal fiction: foreign law is presumed to be the same as English law unless the contrary is proved. Resort to English law in the circumstances of *Callwood* v. *Callwood* in the absence of proof of Danish law is, of course, unexceptionable. But supposing the *lex situs* had not been English law, would automatic resort to English law, simply as the *lex fori*, be desirable? If the only connexion with English law is that it is the domestic law of the forum perhaps a more imaginative approach might be preferable to its blind application. The presumption that a foreign law is the same as English law becomes particularly unattractive when the foreign law in question is not based upon the Common Law. Again, even if the foreign law is in the Common Law tradition, the application of English law has little to commend itself if there has been significant statutory change either in England or in the foreign jurisdiction.

One may venture to suggest that the rule, that when foreign law is not proved an English court must apply English law, has been dictated by misplaced regard for the dogma that foreign law is fact. To regard the distinction between law and fact as an analytical truth, fundamental and ascertainable, from which legal consequences follow is a fallacy which has bedevilled many parts of the law. It is the legal rules (misleadingly styled legal consequences) themselves which are significant: the distinction between law and fact is no more than a generalization about the way in which certain legal rules tend to coincide in their operation. For instance, matters which are determined by the jury rather than the judge tend to be the same as those as to which a representation may give rise to a common law estoppel. Such matters are usefully labelled 'fact' as distinct from 'law'. This distinction between law and fact does not cause such rules to coincide in their operation. It is a generalization which this coincidence makes

[1] *Per* Lord Jenkins delivering the opinion of the Board, [1960] A.C. 659 at p. 683.

[2] (1897), 14 S.C. 61. Although an English case, this is unreported in England. Stirling J. sent a case for the opinion of the Supreme Court of Cape Colony. A couple, domiciled in South Africa, had been married there without an ante-nuptial contract. The question before the English Court was as to whether land in Cornwall was subject to the South African doctrine of community of property. The South African Court gave an affirmative answer (whether or not the couple acquired an English domicile): Stirling J. accepted this opinion, thus submitting the determination of rights in English land to the law of Cape Colony.

possible. That it is no more than a generalization is illustrated by the well-established rule that determination of foreign law is for the judge not the jury. There could, it is submitted, be no properly taken doctrinal objection to English judges taking judicial notice of foreign law in certain circumstances, even when it is not notorious, it has not been admitted and the parties have not consented. Indeed, there are cases in which, judging from the law reports, foreign law has in effect been judicially noticed.[1] In *Saxby* v. *Fulton* Bray J. said:

'I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game.'[2]

The talismanic quality of the distinction between law and fact is well illustrated by the rule that the House of Lords, when hearing an English appeal, takes judicial notice of Scots law and vice versa: what was a matter of fact before the trial and appellate courts below undergoes metamorphosis before the supreme tribunal.

A less rigid approach to situations, in which foreign law is applicable according to the choice of law rules of the forum but in which it is not adequately proved, has been made in some common law jurisdictions outside England. In *Cuba Railroad Co.* v. *Crosby*[3] the Supreme Court of the United States held that it was improper for a federal court to presume that the law of Cuba was the same as that of the forum: 'the presumption should be limited to cases in which it reasonably may be believed to express the fact'. The American *Restatement* similarly provides that: 'In the absence of evidence, the common law of another common law state is presumed to be the same as the common law of the forum',[4] but that 'There is no presumption that the statutory law of another state is the same as that of the forum',[5] and 'if the law of another state is not based on the common law, the court at the forum will not presume the foreign law to be like that of the forum'.[6]

It is reasonable to presume in the absence of evidence to the contrary that the pure common law of one jurisdiction is the same as the pure common law of another. But when the presumption is extended further than this the element of fiction is involved. A legal fiction requires justification. In a few cases this may be found in considerations of pure expediency: a foreign law, far from being notorious, may be so obscure that taking judicial notice simply would not be practicable. But this case is not very typical and will become less so. More generally the presumption reflects a vestigial prejudice in favour of applying the law of the forum. In this respect it is an anomaly (although not the only one of its kind)[7] in modern private international law.

A rigid application of the presumption can interfere seriously with the impact of the substantive law. For instance, it can shift the burden of proof from the plaintiff to the defendant in a simple tort action. If the tort is committed abroad and the plaintiff shows merely that he has a cause of action by English domestic law, the burden of proving no liability by the *lex loci delicti commissi* is put upon the defendant. In a purely domestic tort action in England the burden of proof would have been upon the plaintiff. Moreover, very possibly, if the action had been brought in the courts of the *locus delicti* the burden would have similarly been on the plaintiff.

[1] See, for example, *Re Cohn*, [1945] Ch. 5; also, Dicey, *Conflict of Laws*, 7th ed., p. 1109, n. 28.
[2] [1909] 2 K.B. 208, 211.
[3] 222 U.S. 473; 32 S. Ct. 132 (1912). Practice in the American State courts varies.
[4] *Restatement of Law of the Conflict of Laws*, § 622.
[5] Ibid., § 623.
[6] Ibid., § 622, Comment 6.
[7] See, for example, *The Halley* (1858), L.R. 2 P.C. 193, and *Leroux* v. *Brown* (1852), 12. C.B 801.

As has already been emphasized, the application of English law in *Callwood* v. *Callwood* in the absence of proof of Danish law is quite unexceptionable because English law was the *lex situs* (and, indeed, might have been applicable even if Danish law had been proved). What is submitted is that the automatic application of English law *qua lex fori* in the absence of proof of Danish law would not necessarily have been right. It is suggested (inconsistently with the traditional English approach as epitomized in Dicey's Rule 205, set out above) that the automatic operation of the presumption that the unproved foreign law is the same as English law should be confined to cases in which pure common law is involved, and that in other cases English judges should feel free to take judicial notice of foreign law, resorting to the presumption only when obscurity renders the taking of judicial notice impracticable.

The range of the presumption has been widened by the stringency of the English attitude as to what constitutes adequate evidence of foreign law. In *Callwood* v. *Callwood* the evidence of Danish law was patently inadequate. It consisted of the affidavit of a lawyer practising in the Island of St. Thomas which did little more than incorporate by reference the opinion of the United States Court of Appeals for the Third Circuit in *Callwood* v. *Kean*.[1] Lord Jenkins said:

'Their Lordships strongly deprecate this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand, viz., the destination in view of that law of the proceeds of sale of a particular piece of immovable property situated in territory which at the material time was Danish territory and accordingly subject to Danish law. The judgment of the United States Court, accordingly, provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community.'[2]

The care with which the Privy Council scrutinized the United States judgment and the emphasis placed upon its irrelevance might suggest that, had it been concerned with the very point of Danish law which was before their Lordships, it would have been acceptable evidence. The expert witness was a practitioner in the foreign country in question and it would seem to be consistent with traditional rules for him to incorporate by reference a relevant decision, albeit that of the courts of what in a sense was a third country.[3] On the other hand, the dogma that foreign law is a fact and must be proved as such, apparently requires that citation of relevant foreign cases (or statutes) is not enough; a suitably qualified expert witness must be interposed to do the citing. It is submitted with respect that this is a flaw in the English practice. Of course, an English court would not be bound to follow a foreign decision (indeed, it is not bound to follow an earlier English decision in which the same foreign rule is in issue).[4] But

[1] 189 F. 2d. 565 (1951). The distinguished American conflicts lawyer, Judge Herbert F. Goodrich, was a member of the Court deciding this case. [2] [1960] A.C. 659, 676.

[3] The United States Court was making a finding of Danish law, although the territory in question (the Danish Virgin Islands) had been ceded to the United States.

[4] *McCormick* v. *Garnett* (1854), 23 L.J.Ch. 777; *In re Marseilles Extension Ry. and Land Co.* (1885), 30 Ch.D. 598, 602. The authorities seem to be divided as to whether a court is *allowed* to accept an earlier English decision on foreign law. Contrast, for example, the words of Knight Bruce L.J. in *McCormick* v. *Garnett* in 1854: 'Any other case cannot decide foreign law as a matter of fact here. However inconvenient it may be in some cases, it is a rule that foreign law must always be proved in each particular case, like any other matter of fact. It can make no difference that a particular view of foreign law has been acted upon in reported cases', with,

there is no logical or policy reason for the translation of this freedom into a prohibition. Why should not an English court be permitted to look directly to a foreign decision or statute (or, indeed, to an earlier English decision on the point), especially if it is clear and unequivocal? Scrutton L.J. let fall an encouraging dictum in *Guaranty Trust Company of New York* v. *Hannay & Co.*:

'Foreign law is a question of fact to an English Court; the judgment of a foreign judge is not binding on an English Court, but is the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive.'[1]

Six years later, unhappily, the same learned judge had seemingly resiled from this position. In *Beatty* v. *Beatty* he said:

'We are not entitled to look at an American report, and say on the authority of that report that the American law is so and so. It must be proved by the evidence of experts in that law.'[2]

This latter case is not, however, decisive, for although the Court of Appeal dispensed with proof of New York law and made direct reference to a New York decision no expert witness being called, this was in furtherance of agreement by the parties.

It may well be that in many cases calling an expert witness with practical experience is the most convenient and most reliable way of ascertaining foreign law. The importance of the opportunity to cross-examine must not be forgotten. But in some cases proof of foreign law by direct reference to authorities or even treatises would obviously be adequate. It is submitted that orthodox English doctrine is too rigid in withholding from the judge a discretion to dispense with the interposition of the witness. This flexibility would accord well with a power to take judicial notice in the absence of proof.

In conclusion it is re-emphasized that it is not suggested that an English judge should ever be bound to follow foreign authorities: whatever their force in the country in question, they would only be evidence, but often very useful evidence, in English proceedings. Nor is it suggested that the English judge should be required to take judicial notice in the absence of proof: but a power to do so, in cases in which foreign law is pleaded but not adequately proved, would facilitate avoidance of the absurdities to which the presumption that foreign law is the same as English law can easily lead when the foreign law is either not in the Common Law tradition or has undergone substantial statutory change.

Concepts unknown to English domestic law

Case No. 2. The decision of the Lord Chief Justice in *Phrantzes* v. *Argenti*[3] demonstrates the growing willingness of English courts to recognize rights even though they are unknown to English domestic law, but also their continuing and warrantable reservations about granting remedies which are similarly unknown. Considerations affecting the recognition of rights are obviously not identical with those affecting the granting of remedies. In *Phrantzes* v. *Argenti*, a daughter who had recently married in England, claimed a declaration from the English High Court that she was entitled to be provided with a dowry by her father. Father and daughter were both residing in England, but they were Greek nationals and the decision proceeded on the basis that

for example, the more modern *Simons* v. *Simons*, [1939] 1 K.B. 490, where Goddard L.J. (sitting as a trial judge) seems not to have queried counsel's citation of *Beatty* v. *Beatty*, [1926] 1 K.B. 807, in order to prove New York law.

[1] [1918] 2 K.B. 623, 667.

[2] [1926] 1 K.B. 807, 814–15.

[3] [1960] 2 Q.B. 19.

the father was at all material times domiciled in Greece. By Greek law a father is obliged to constitute on behalf of his daughter entering on marriage a dowry in accordance with his fortune, the number of his children and his social position and that of his son-in-law. The dowry consists of property granted to the husband and is constituted by a contract entered into with the husband by notarial deed. Should the father fail to provide a dowry the daughter, and the daughter alone, has a cause of action in the Greek courts to obtain an order condemning him to conclude a dowry contract with her husband. If the father is abroad he may be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings a Greek court decides what in all the circumstances is the appropriate amount of the dowry and may specify the assets to be handed over. No dowry is constituted until the father has entered into the contract so ordered, and if he disobeys the order the only course apparently open to the daughter by Greek law is to secure his imprisonment or bring an action for damages.

In the instant proceedings the matter came before Lord Parker C.J. on a preliminary issue ordered by the Master as to 'whether on the assumption that the defendant was at all material times domiciled in Greece the plaintiff is entitled to the relief claimed'.

The Lord Chief Justice rejected any suggestion that the right claimed by the daughter could not be recognized simply because it is unknown to English domestic law. This outmoded doctrine appears to have played some part in the reasoning of Astbury J. in *In re Macartney*.[1] That learned judge there declined, for an amalgam of reasons, to enforce the judgment of a Maltese court condemning a testator's estate to provide permanent maintenance for his illegitimate daughter. To the extent that the *Macartney* decision does rest upon general refusal to recognize rights unknown to English law it was not followed in *Phrantzes* v. *Argenti*. Lord Parker further rejected any idea that this Greek law was not intended to have extra-territorial effect, finding as a fact that the Greek courts would condemn a father resident abroad to enter into a contract before a Greek consul or a foreign notary public. The New York case of *Brimont* v. *Penniman*,[2] upon which reliance was placed in *In re Macartney*, was distinguished on this point. Furthermore, any contention that the recognition of the plaintiff's right to dowry would be contrary to public policy was rejected. The Lord Chief Justice cited with approval the well-known words of Cardozo J. in *Loucks* v. *Standard Oil Co. of New York*:

> 'If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'[3]

Of the right claimed by the plaintiff, Lord Parker concluded:

> 'It is, I think, a right which could be enforced here if, for instance, it was a right to payment of a fixed sum of money or a definite proportion of the father's fortune simpliciter.'[4]

It was the nature of the remedy sought not the nature of the right which caused the plaintiff daughter to fail. She sought not only a declaration that she was entitled to be provided with a dowry, but also an account of the defendant's property and an inquiry

[1] [1921] 1 Ch. 522.
[2] (1873), 10 Blatchford's Circuit Court Reports 436.
[3] (1918), 224 N.Y. 99, 110–11.
[4] [1960] 2 Q.B. 19, 34.

as to the amount of dowry properly payable by the defendant and such further inquiry, judgment or order as might be required to give effect to the declaration sought. Parker L.C.J. said:

'Before the order can be made the court must inquire into the extent of the father's fortune and that of his daughter's. The court must further consider the respective social position of the father and son-in-law, that is their positions in the Greek or other community where each is living, and decide what is the appropriate amount of dowry. It must decide, if the point is raised, whether the daughter has committed a fault within article 1497. It will often have to decide in all the circumstances what the dowry is to consist of, how much of it shall be land, how much movables, whether any part of it is to consist of the usufruct from property and, if so, for how long it is to be granted, whether the use of a house free of rent is to be provided, and in addition, what are to be the terms as to ownership of the dowry whether movable or land (article 1412).'[1]

The learned judge took the view that these considerations, taken as a whole, involved so large a measure of discretion that it would be wrong for an English court to exercise jurisdiction:

'All these enquiries and decisions are essentially matters for the domestic courts, and matters largely for the discretion of those courts and not our courts.'[2]

To hold that foreign law involving a substantial element of discretion will never be applied in an English court would be to lay down a new and undesirable rule of private international law. Lord Parker referred to *Koonatzki* v. *Oppenheimer*.[3] But there the most that can be found to lend colour to so wide a proposition is a somewhat guarded dictum of Farwell J., in which he expressed grave doubts as to whether, if the matter before him 'lay *wholly* in the discretion of the courts in Germany—that is to say, it was *purely* a matter of discretion, and not a question of fact or law',[4] he could properly exercise such a discretion. Sometimes the application of a foreign rule involving the exercise of a discretion will be practicable in an English forum. Sometimes it will not. The difficulty in exercising the discretion in *Phrantzes* v. *Argenti* was really a practical one: having regard to the nature of the discretion, England simply was not a convenient forum. It is suggested that resort to the flexibility of a *forum non conveniens* doctrine could have been preferable to reasoning which might lend support to the view that an English court will never exercise discretion in the course of the application of foreign law.

A second ground for the decision in *Phrantzes* v. *Argenti* is that English law does not provide relief appropriate to the right claimed. Even if the English court were to determine the amount of the dowry, it could do more than order payment of that amount to the plaintiff. But this would be to enforce a right which the plaintiff does not possess by Greek law. The English court has no power to direct a person to enter into a contract.

'I know of no power in the court, inherent or otherwise, which would enable the court to give relief which was consistent with the plaintiff's right under Greek law.'[5]

Lord Parker cited § 608 of the American Law Institute's *Restatement of the Law of Conflict of Laws*,

'If no form of action is provided by the law of a state for the enforcement of a particular foreign right, no action to enforce that right can be maintained in that state. *Comment:*

[1] [1960] 2 Q.B. 19, 34–35.
[2] [1960] 2 Q.B. 19, 35.
[3] [1937] 4 All E.R. 133.
[4] [1937] 4 All E.R. 133, 138. Italics supplied.
[5] [1960] 2 Q.B. 19, *per* Lord Parker C.J., at p. 36.

a. The form of action is a matter of procedure. A court will not invent a new form of action, unknown to the law of the forum, in order to give a remedy on a foreign cause of action.'

It is interesting to note that whereas this section of the 1934 *Restatement* was headed 'No form of Action Provided' and was contained in the Chapter on Procedure, the corresponding Section in the Tentative Draft of the new *Restatement*[1] (not mentioned by Lord Parker) is entitled 'Nonavailability of Appropriate Type of Proceeding' and is contained in the Chapter on Limitations on the Exercise of Judicial Jurisdiction. The new section itself has been more elegantly and apparently[2] more flexibly phrased thus:

'A state does not exercise judicial jurisdiction where no type of proceeding provided by its local law is appropriate for the enforcement of a particular cause of action. *Comment a*. A court will not invent a type of proceeding, unknown to its local law, in order to give a remedy on a foreign cause of action. Suit on such a cause of action will therefore be dismissed.'

A new *Comment b*. is introduced emphasizing that 'The rule of this Section has an extremely narrow range of application'. Both this latter addition and the shift from the technicalities of procedural terminology to a criterion of appropriateness have salutary significance: refusal to enforce a foreign right on the ground under discussion should not be resorted to except where the best remedy available in the forum is really markedly unsuitable. Lord Parker said 'the remedies available must harmonise with the right according to its nature and extent as fixed by foreign law':[3] it is respectfully submitted that this lack of harmony ought to amount to considerable discord before a court is justified in refusing to give effect to a foreign right simply because of the non-availability of an appropriate remedy. But it is not suggested that such discord was lacking in *Phrantzes* v. *Argenti*.[4]

Formal validity of marriage

Case No. 3. The case of *Hooper* (*orse. Harrison*) v. *Hooper*[5] has not found its way into the Law Reports. In the Weekly Law Reports Stevenson J.'s reported judgment occupies but fifteen lines and is devoted almost entirely to findings of fact. No cases were referred to in argument. It is, however, a decision of some significance in the private international law of marriage. It seemingly consolidates the operation of the doctrine of *renvoi* in this sphere.

The parties, both of whom were British subjects domiciled in England, went through a ceremony of marriage, which was performed according to the rites of the Church of England, in the English church in Baghdad. To the knowledge of both parties no banns had been published. The wife subsequently petitioned in England for a declaration of nullity. Evidence was given on affidavit by an Iraqi lawyer that:

'The original of the [duplicate certificate of marriage] would be accepted as prima facie evidence of a valid marriage in the courts of Iraq. On the assumption that the parties are

[1] American Law Institute: *Restatement of the Law Second: Conflict of Laws*, § 117 *f*.

[2] But see the reporter's note suggesting that the title and black letter rule have been rephrased for reasons of 'literary taste' (Tentative Draft No. 4, p. 74).

[3] [1960] 2 Q.B. 19, 35.

[4] A related rule is that embodied in § 117 *g* of the second *Restatement*: 'A state does not exercise judicial jurisdiction where any judgment rendered by its courts would impose upon the defendant a more onerous, or a substantially different, duty than that which would be imposed upon him by the applicable foreign law.' So far as this refers to more onerous duties it is not clear that it states the English law. But it is perhaps surprising that Lord Parker, in his reference to the *Restatement*, did not mention this Section (or § 609 of the first *Restatement*, which it replaces).

[5] [1959] 1 W.L.R. 1021.

of English nationality the actual validity of the marriage in Iraq would depend on whether the said marriage was in fact celebrated in accordance with the forms and requirements of English law.'

The learned judge held that the validity of the marriage fell to be determined by English law: the provisions of section 25 of the Marriage Act, 1949, were accordingly applicable, and since the parties had knowingly and wilfully intermarried according to the rites of the Church of England (otherwise than by special licence) without banns having been duly published, the marriage was null and void.

It is well stablished that the formal validity of a marriage is governed by the law of the place of celebration. For a long time there was nothing in the English authorities to suggest that in this context 'law' meant anything other than the local domestic law. But in *Taczanowska (orse. Roth)* v. *Taczanowski*[1] the Court of Appeal would apparently have been willing to uphold a marriage celebrated in Italy, although it did not satisfy Italian domestic requirements as to form, if an Italian court would have been willing to recognize it as valid. An Italian court would have upheld the marriage if it had been formally valid by the law of the common nationality, in this case Polish law. However, the marriage was formally invalid not only by Italian domestic law, but also by Polish law and thus by Italian conflicts law.[2] It is stated in the seventh edition of Dicey that the dicta in the *Taczanowska* case imply no more than that the conflicts rules of the *locus celebrationis* can validate a marriage: they cannot invalidate one. In other words, reference to the *lex loci celebrationis* is an alternative reference to either its conflicts rules or its domestic rules.[3]

It is unfortunately not altogether clear from the report of *Hooper (orse. Harrison)* v. *Hooper* whether or not there was any formal defect in the marriage according to Iraqi domestic law, i.e., whether the marriage would have been valid there had the parties been domiciled Iraqis of the Anglican persuasion. If there was in fact no such defect, then the decision is clearly important. It establishes that a marriage to be regarded as formally valid in an English court must be one which would be regarded as formally valid in the courts of the place of celebration—those courts, of course, applying their own appropriate conflicts rule. On this view of the facts of *Hooper (orse. Harrison)* v. *Hooper* compliance with the local domestic rules is not a permissible alternative and Dicey's contrary assertion must be discarded. If, however (as seems more probable), the parties in the *Hooper* case did not comply with the formal requirements of Iraqi law, it does not, as a decision, actually stand in the way of regarding reference to the *lex loci celebrationis* in the case of formalities of marriage as an alternative reference to either its conflicts rules or its domestic rules. But in principle there seems to be little to be said for such an interpretation. Moreover, it is probably an unwarrantable deduction from the dicta in *Taczanowska (orse. Roth)* v. *Taczanowski*. It may well be that in that case the marriage would have been rendered formally valid if the parties had complied with the formal requirements of either Italian domestic law or Polish law. But the evidence of Italian law accepted at the trial by Karminski J. seems to have been that an *Italian court* would have recognized the formal validity of the marriage if the parties had satisfied the local formal requirements. The learned judge said:

'Dr. Nissim [the expert witness on Italian law] summarised his views in answer to the following question put to him in re-examination by Mr. Simon: "If [the Italian court] finds that neither Italian law has been complied with nor the national law of the two

[1] [1957] P. 301. See this *Year Book*, 33 (1957), p. 332.

[2] The marriage in *Taczanowska (orse. Roth)* v. *Taczanowski* was upheld on other grounds not relevant here.

[3] Dicey, *Conflict of Laws*, 7th ed., p. 76.

parties so far as formalities are concerned, what judgment will it pronounce on the validity of the marriage?" Answer: "They will pronounce that there is no marriage according to Italian law." '[1]

If an Italian court would regard the marriage as valid on alternative grounds, it of course follows, that an English court, seeking to apply Italian conflicts rules, would do likewise. But this has no bearing upon the case in which the courts of the place of celebration would not regard the marriage as formally valid on alternative grounds. In such a situation authority does not require and the dictates of common sense would not countenance the upholding of the marriage on the grounds that the parties have in fact satisfied the formal requirements which the courts of the *locus celebrationis* would have regarded as adequate in a different and domestic case. It is axiomatic in the private international law of marriage that, generally speaking, matters pertaining to the ceremony are the concern of the *locus celebrationis*. The pertinent investigation in any given case must be as to whether or not there has been compliance with the formalities prescribed by the *lex loci celebrationis* for that given case. Even assuming that in the *Hooper* case the parties did not comply with the formal requirements of Iraqi domestic law (and that the case is therefore not an actual decision on the point), it seems clear in principle that compliance with such requirements would not in itself have made any difference. It would not have made any difference unless an Iraqi court would then have upheld the marriage in the same way as an Italian court would apparently have done in the *Taczanowska* case.

Characterization and the validity of marriage

Case No. 4. A domiciled Dutchman, aged 29, and a domiciled Dutch girl, aged 18, came to Scotland with the intention of marrying. An objection to the intended marriage was lodged on behalf of the girl's father, who had not consented to the intended marriage. According to the Dutch Civil Code parental consent is required for the marriage of a person under twenty-one years of age: indeed, a marriage taking place without such consent can be annulled in the Netherlands on the application of either parent of the minor within six months. According to Scots law a girl over eighteen can marry without parental consent. In *Bliersbach* v. *MacEwen*[2] the Inner House of the Court of Session held that the couple was not disqualified from marrying in Scotland, the *lex loci celebrationis* not the *lex domicilii* being the applicable law.

The matter for the Court's determination could be stated simply and it was so stated by the Lord President:

'The question accordingly is, whether the necessity for parental consent is in this case to be determined by the law of the domicile of the minor or by the law of the place where the marriage is solemnised.[3]

It is a question of characterization in stark form.

The Lord President continued:

'The solution to this problem depends, in my opinion, upon a consideration of the nature and quality of the impediment to marriage created by the requirement of parental consent.'[4]

[1] [1957] P. 301, 305. This is logically not conclusive. But it seems odd that the question to the witness should have been framed in this way unless his evidence had been that for an Italian court compliance either with Italian domestic law or with Polish law would suffice. It is to be noted, too, that Hodson, L.J. (at p. 318) refers to Article 226 of the General Provisions preliminary to the Italian Civil Code as being validating provisions.

[2] [1959] Session Cases 43; [1959] Scots Law Times Reports 81.

[3] [1959] Session Cases 43, 49.

[4] [1959] Session Cases 43, 49.

He then distinguished the *impedimentum dirimens* from the *impedimentum impeditivum*: the former makes the marriage substantively void, the latter merely prohibits its celebration.

'From this it follows in the present case, that, if parental consent is an *impedimentum dirimens* the law of the girl's domicile is probably the proper law to apply, but if that consent is an *impedimentum impeditivum*, then the law of Scotland will determine whether such consent is necessary. It is, in my opinion, firmly settled that parental consent is an impediment in this latter category.'[1]

It is to be noted that the learned Lord President regarded as controlling the fact that parental consent is so characterized in the domestic law of Scotland. It is to be noted, too, that he embraced the English decisions of *Simonin* v. *Mallac*[2] and *Ogden* v. *Ogden*.[3]

'The case of *Ogden* v. *Ogden* has been adversely commented upon more than once (e.g., *Attorney-General for Alberta* v. *Cook*[4] and *Chapelle* v. *Chapelle*[5]) but these comments have been directed to a quite different point, namely, the extent to which the English Courts should recognise a decree of divorce pronounced in France, the country of the domicile. That point has not any bearing on the present question, and I have not found any case in which the decision in *Ogden* on the present question has been criticised.'[6]

At the end of his judgment the Lord President said that he was 'confirmed' in his conclusion by the fact that the Dutch rule apparently itself purported to deal with formalities.

'In my opinion, an impediment of this kind [i.e. that embodied in the Dutch rule] is not such as to affect the minor's capacity to marry, if she goes to another country for that purpose and no such impediment is imposed by the law of that other country.'[7]

Lord Sorn was the only other judge to deliver a full judgment[8] in *Bliersbach* v. *MacEwen*. The general tenor of his judgment, although couched in terms of formalities and capacity, is similar to that of the Lord President. But Lord Sorn did suggest that, even if the Dutch rule had purported to deal with capacity, this would make no difference.

The case of *Bliersbach* v. *MacEwen* has two important and interesting aspects. The first is the actual decision to characterize the parental consent requirement as an *impedimentum impeditivum* or matter pertaining to the form of the ceremony. The second is the significance or otherwise of the way in which the matter would be treated by Dutch law.

So far as the actual decision is concerned, it is submitted with respect that the fact that such a requirement would be treated as a matter of form in a purely domestic Scottish case should not be accepted as conclusive of the matter. It is perhaps significant that there seems to be no acknowledgement in the case of the existence of characterization as a separate private international problem. In principle there would seem to be little to be said for the view that simply because a matter is regarded as pertaining

[1] [1959] Session Cases 43, 49–50.
[2] (1860), 2 Sw. & Tr. 67.
[3] [1908] P. 46.
[4] [1926] A.C. 444.
[5] [1950] P. 134.
[6] [1959] Session Cases 43, 50–51.
[7] [1959] Session Cases 43, 51.
[8] Lord Sorn ranged somewhat widely in some of his *obiter dicta*. At one point the interesting suggestion was made that the question whether parties can legally marry perhaps ought not necessarily to be treated in the same way as the question whether they have legally married. It is in this context that the learned judge said, at p. 55, 'upon one view (which has much to recommend it), the law by which the ultimate validity of the potential marriage falls to be decided is the law of the intended matrimonial domicile of the marriage, as that may be *ex post facto* determined'.

to form in a domestic case, it must inevitably be so classified in a conflicts case with the consequence that it will be submitted to the *lex loci celebrationis*. Conversely, there would seem to be little to be said for submitting a matter to the *lex domicilii* simply because it would be classified as pertaining to capacity in a domestic case. The categories of form and capacity in conflicts cases must be defined in the light of policy considerations not identical with those operating in a purely domestic case. There has often been a marked and regrettable tendency to ascribe unquestioningly to a word in a conflicts case the meaning which that word has acquired in a domestic case. Often courts have failed to heed the warning uttered by the late W. W. Cook:

'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.'[1]

Once it is accepted that the category of formalities for conflicts purposes is independent of its domestic linguistic counterpart, the argument that parental consent is a matter most appropriately dealt with by the law of the domicile is entitled to consideration. The limits of the scope of any choice of law rule should be based upon policy considerations not upon blind striving after verbal consistency between conflicts and domestic concepts. In the context of the rules under consideration one might relevantly ask whether that community in which a child has its permanent home or that of the place in which it seeks to go through the ceremony of marriage has the greater legitimate interest in the significance to be attached to the requirement of parental consent. Had the Court of Appeal in *Ogden* v. *Ogden* approached the matter in this way a result described by Falconbridge as 'grotesque from the social point of view'[2] would have been avoided. This English authority, of which a learned writer has said, 'There is no case in the English conflict of laws which has been subjected to more vigorous criticism',[3] was not, of course, binding upon the Court of Session in *Bliersbach* v. *MacEwen*. Nor was the earlier case of *Simonin* v. *Mallac*[4] which the Court of Session nevertheless seems to have viewed with favour. It is sobering to note that within months of it doing so, Willmer J., delivering the judgment of the Court of Appeal, said of *Simonin* v. *Mallac*, '... As a matter of history the decision was that English law was applicable, and not the law of the domicile, so that the marriage was pronounced valid and the petition for nullity was dismissed. No doubt the question, if it arose today, would be decided the other way, and to that extent the decision is of no weight.'[5]

Whether a particular matter, e.g. parental consent, is to be governed by the *lex loci celebrationis* or the *lex domicilii* is obviously for the forum to decide. The forum is applying its own conflicts rules and the problem of characterization is no more than an aspect of the formulation of those rules. It is submitted, therefore, that in *Bliersbach* v. *MacEwen* any reference to Dutch law at this stage is out of place and that the dicta of Lord Sorn are to be preferred to those of the Lord President on this point. The utility of reference to the Dutch rule at this stage is simply to indicate the nature of the problem to be characterized: it is not to control its characterization. Lord Sorn put the point very succinctly:

'If we are to regard consent as part of the ceremony of marriage—and I think that is

[1] Cook, *The Logical and Legal Bases of the Conflict of Laws*, p. 159.

[2] Falconbridge, *Essays on the Conflict of Laws*, p. 74.

[3] Morris, *Cases on Private International Law*, 3rd ed., p. 92. Dr. Morris dissociates himself from some of the criticism.

[4] (1860), 2 Sw. & Tr. 67.

[5] *Ross-Smith* v. *Ross-Smith*, [1961] 2 W.L.R. 71, 77.

how we do regard it—there is a good deal to be said for the view that we should act upon this understanding regardless of what the provisions of the foreign law on the subject may be. It must be remembered that the question which we are considering is whether a marriage may legally take place in Scotland, and, at least at this stage, is there not much to be said for the view that, this being the place of the marriage, we should apply our own law with regard to the ceremony and what it covers?'[1]

Assuming that the problem of parental consent is most happily characterized as form, or in other and more informative words, it is characterized as within the scope of the *lex loci celebrationis*, the *lex domicilii ex hypothesi* does not come into the picture.

If, however, the Court of Session had characterized the problem of parental consent as being one within the ambit of the rule that capacity is governed by the *lex domicilii*, the nature of the Dutch rule would then, but only then, have become of crucial significance. If the Dutch rule, for example, purported to do no more than regulate ceremonies in Holland, the application of the rule by the Scots court would not lead to the invalidation of the Scots marriage. For this reason if the Court had in *Bliersbach* v. *MacEwen* characterized the matter as one of capacity not form, the marriage might still have been valid. But in *Ogden* v. *Ogden* if a similar characterization had been made the marriage ought seemingly to have been held invalid, it being reasonably clear that the French rule there was prohibitory and did not purport merely to regulate form. So if the Dutch rule was prohibitory the marriage should have been void. But it is to be emphasized that any investigation of the nature of the Dutch rule is premature until the Scots forum has identified its applicable choice of law as one requiring the application of the *lex domicilii* to the problem before the court. In fact, in *Bliersbach* v. *MacEwen* this stage was never reached, for the Court of Session decided that parental consent is within the ambit of the rule that matters of form are governed by the *lex loci celebrationis*. This decision was reached without any reference to Dutch law, Lord Sorn expressly rejecting the propriety of such reference and the Lord President saying no more (and this *obiter*) than that he was 'confirmed' in the conclusion which he had already reached by the fact that the Dutch rule itself apparently purported to deal with formalities. In these circumstances one must respectfully query the formulation of the headnote in the Session Cases Reports. It runs thus:

'*Held* that the parties' capacity fell to be determined according to the law of Scotland; and that the absence of parental consent, being by the *lex domicilii* an impediment prohibitive, and not an impediment irritant, did not constitute a legal impediment to their marriage in Scotland.'

The phrase 'by the *lex domicilii*' should, it is submitted, be omitted. If this is done, this headnote is brought into conformity with that in the Scots Law Times Reports. Unless it is done, it embodies a proposition which is contrary to principle and which does not seem to be supported by their Lordships' decision.

P. B. Carter

[1] [1959] Session Cases 43, 54–55.

REVIEWS OF BOOKS

Académie de Droit International de la Haye: Recueil des Cours, 1958. Volumes 93, 94 and 95. Leyden: A. W. Sijthoff, 1959. 570 pp., 626 pp., and 418 pp.

The three volumes of the Academy's collection for 1958 contain the customary rich variety of subject-matter and thus include broad surveys of the major disciplines and generous specialist treatments of particular problems, among them some valuable contributions relating to the sources of international law. The first of these volumes commences with a careful study on 'Sale in Private International Law', by Baron Louis Frédéricq, an authority on Belgian commercial law and Belgian representative at The Hague Conferences on Private International Law in 1951 and 1956. His subject-matter is closely related to the principles contained in the Benelux Treaty of 11 May 1951, the Convention of 15 June 1955, which was a product of The Hague Conference of 1951 and has received the adherence of ten States, in the complementary Convention adopted by the Eighth Session of The Hague Conference in 1956 on the law applicable to the transfer of property in international sales of corporeal movables (*objets mobiliers corporels*), and in the Convention on the competence of the contractual forum in international sales of corporeal movables adopted at the same session. These treaties provide that signatories must introduce a uniform law applicable even to *ressortissants* of States which have not signed the conventions, and they were drafted with the needs of the business world in mind. They represent developments of great practical importance with which English lawyers are insufficiently familiar. Baron Louis Frédéricq relates these developments to the wider problem of unifying private law and the problem of identical texts subject to diverse interpretation by national courts which he considers might be solved by a Benelux court.

Dr. Chacko takes as his title 'India's Contribution to the Field of International Law Concepts'. He commences with a chapter on the background of international law in ancient India, an interesting short study, although it might have contained references to the general works on the subject by Banerji and Viswanatha. The following two chapters present a survey of the rules of international law as applied by the Indian courts between 1947 and 1957. The interest and value of the subject is affected unfortunately by a lack of uniqueness in the judicial approach which is still largely based on the practice of the British courts and by the fact that only the summaries of the cases have been used. Many of the cases considered relate to State succession and sovereign immunity; and of these *Indian National Steamship Co.* v. *Max Faulbaum* (1953), Calcutta High Court, on waiver of immunity and the issue raised in *Yuan Ismael* v. *The Government of Indonesia*, is of especial interest. His fourth chapter contains a valuable and succinct account of the legal character of and problems deriving from the paramountcy of the British Crown in India, a fascinating illustration of the problems of personality in international law. Dr. Chacko's study ends with an exposition of the legal aspects of the Kashmir problem. It is a pity that he did not consider that his title justified more general reference to the positive aspects of Indian State practice since 1947.

For those interested in the International Court of Justice and its predecessor Professor Briggs's lectures on 'Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice' provide a major contribution to the literature on

reservations to declarations pursuant to Article 36, paragraph 2, of the Statute of the Court. A large number of delicate problems relating to the condition of reciprocity, reservations *ratione temporis* and reservations of matters with regard to matters of 'domestic jurisdiction' receive lucid and careful treatment. He concludes, *inter alia*, that the condition of reciprocity is contained in Article 36, paragraph 2, not paragraph 3, and is a jurisdictional requirement absolute in character which applies to declarations made without reservation of reciprocity. Further, the critical date for establishing the coincidence of two declarations in conferring jurisdiction is the date on which the application is filed with the court and reciprocity does not apply to measures taken by the States concerned before this date.

Professor Charles Rousseau provides the general course, 'Principles of Public International law', in the present volume. His object is to outline a general theory of international law but at the same time to discuss each major topic in relation to its general context and the existing situation. He considers international law to be a legal order differing from other legal orders in the form of social organization which accompanies it: it is a law of co-ordination, internal law is one of subordination. The essential function of law in his opinion is the conferment, distribution and regulation of spheres of competence: and this view provides a stimulating background to the presentation of his materials. In considering a variety of developments in the law he uses effectively many illustrations from the most recent materials of the law and is not averse to passing judgment on modern trends in State practice and jurisprudence. Thus he implicitly approves of the principle of effective nationality, deplores the decline of the plebiscite and is sceptical of the doctrine of non-recognition. In general his brief surveys of large questions are thought-provoking, although his mode of distinguishing *de jure* and *de facto* recognition of Governments does not seem satisfactory.

The first study presented in the second volume of the collection is Professor Guggenheim's 'Contribution to the History of the Sources of the Law of Nations'. The two opening chapters on the origins of the concept of the law of nations relate to relatively familiar subject-matter but the treatment, though of necessity compressed, is masterly and in no way superficial. Moreover, these chapters form the prologue to a very original and valuable study of the history of the sources of law set out in Article 38, paragraph 1, of the Statute of the International Court of Justice. The results of this work provide interesting, but far from conclusive, evidence on some vital questions, for example, whether customary rules depend on actual or tacit consent, and the meaning of 'general principles of law'. Professor Guggenheim considers that the view that the latter are not legal principles applied *in foro domestico* is not supported by the *travaux préparatoires*.

There follows a very substantial discussion of 'The General Principles of Private International Law', by Professor Wortley. This is not presented as an orthodox general course based on the English experience: the object is to relate the solution of particular problems to the judicial practice of a number of States, the contents of the Benelux Convention on the Conflict of Laws and the European Convention on Human Rights which, in the words of Professor Wortley, 'offers certain general standards of legal principles, based on the Universal Declaration of Human Rights, which should prove a touchstone for all of us when considering basic values to be protected in private international law'. Such an approach provides a refreshing contrast to 'homeward trendism' and the working out of permutations from the decided cases with too little thought for the fact that morals and policy will not always follow the rigours of a mathematical logic. Topics given special emphasis are the family, contracts, protection

from personal injury and the protection of property, and there is a wealth of material on confiscation and expropriation.

Professor Tammes remarks that in spite of the widening of research into the decision-making process in international organizations the decisions of international organizations as such have only rarely become the subject of a comparative and generalizing study as to their function and effect and yet these decisions comprise a source of international law. He proceeds to remedy the situation by his study of 'Decisions of International Organs as a Source of International Law'. However, the important question of the creation of estoppels as a result of participation in voting and the making of decisions is not accorded more than passing notice.

State responsibility has been the object of attention by the International Law Commission in recent years and its rapporteur on the subject, F. V. Garcia-Amador has contributed a comprehensive examination of the problems involved to the present volume. He does not regard his task merely as an aspect of codification of existing law for he considers that these principles must be developed in relation to recent trends in international law. Thus his treatment places emphasis on the new aspects of State responsibility, in particular the concept of criminal responsibility, and the tendency to regard international organizations and individuals as subjects of international law. His criticisms of the orthodox view that States alone have personality are acute but it may be doubted if he establishes that the individual is a subject of the law. In any case it would be helpful if writers on this problem would define their terms: it is in practice a question of capacity in a particular context, not 'full' personality *vel non*. Moreover, his method of explaining the arguments of the Court in the *Reparations* case is unconvincing (at pp. 424–5, 442–4).

The final course in the second volume falls within the sociology of international law. Jacob Robinson has had much experience of the working of the organs and various agencies of the United Nations and his subject, presented under the title 'Metamorphosis of the United Nations' is of very considerable interest. He commences by summarizing the characteristics of the Organization at its inception and considers the modifications which have occurred in subsequent practice. The basis of admission to membership, the degree to which national rather than international interests motivate the votes of members, the 'Uniting for Peace' resolution, and the constitutional history of the Charter are among the principal matters discussed. His conclusion is that 'neither in letter, nor in spirit, nor in substance is the United Nations what it was supposed to be at the San Francisco Conference'. This has pessimistic undertones and it is possible that Mr. Robinson has underestimated the value of adaptability in a rapidly changing international society. It is unfortunate that his useful bibliography could not include the recent work by Robert E. Riggs, *Politics in the United Nations*, Urbana, 1958, which, incidentally (pp. 171–2), states that the twenty-one Latin-American States in the United Nations have voted with the United States 93 per cent. of the time on non-colonial issues and 90 per cent. of the time on other issues: this might seem to contradict Mr. Robinson's view that the Latin-Americans are detached from big-power politics (p. 512).

The third volume of the collection for 1958 provides further evidence of the varied subject-matter and high standards of presentation which the Academy offers. The first contribution, on 'Co-existence and International Law', is by Professor Grigory I. Tunkin, head of the Legal Department of the Ministry of Foreign Affairs of the U.S.S.R. and a member of the International Law Commission. As he admits, the title is vague and in fact most of his study, some seventy pages, is devoted to a study

of problems relating to the sources of international law from the Soviet point of view. Detailed consideration is given to the formation of customary rules and the extent to which their obligatory nature depends on actual 'recognition' or 'acceptance' by States. In contrast to the view of Professor Guggenheim, Professor Tunkin considers that 'general principles of law' can only be principles of international law, and not general principles of different national legal systems: the latter have influence on the content of the former but are legal norms of a different quality. In his third chapter he considers those parts of the substantive law which in his opinion reflect the influence of the principle of peaceful co-existence, and in the final chapter he attacks the concept of an 'intermediate status' between peace and war. This is followed by Dr. Bolla's course, entitled 'From the Universal Copyright Convention to an International Convention on "Comparable" Rights', and consisting of an historical survey, an examination of the Universal Copyright Convention signed at Geneva in 1952 by thirty-six States, and a consideration of the means for extending legal protection to interests, such as those of radio performers and recording artists, analogous to those of authors. Dr. Schatzel presents a very learned study on 'Personal Names in International Law' which involves a variety of legal sources including private law and those principles of municipal and public international law relating to nationality. Special consideration is given to problems arising from double nationality and statelessness, and the names of royal and noble families. The collection for 1958 is completed by Professor Ziccardi's doctrinal study of 'The Characteristics of the International Legal Order' in which he prefers to examine the historical experience in a pragmatic spirit without an uncritical adoption of either a monist or a dualist position.

IAN BROWNLIE

Dictionnaire de la terminologie du droit international. Published under the patronage of L'Union Académique Internationale. Paris: Édition Sirey, 1960. xv+755 pp.; 63 n.f. (55 n.f. paper-backed).

The simplest way to convey to English lawyers the general nature and scheme of this *Dictionary of the Terminology of International Law* is to say that it does for international law very much what Stroud's *Judicial Dictionary* does for English law. The book examines over 700 words and phrases used in international law. It gives a definition or explanation of the meaning of each word or phrase, and also of any alternative or secondary meanings which it may have. In the majority of cases it illustrates the definition or explanation by citing examples of the use of the word or phrase in treaties, diplomatic correspondence, the proceedings of conferences, arbitral or judicial decisions, resolutions of international organizations, or from the works of writers. In short, it puts the reader quickly on to places where he may find authority for the particular definition or explanation of the use of the word or phrase. The *Dictionary* is throughout written in French, even where the quotation itself may come from a source in another language. This was almost inevitable if the *Dictionary* was to have uniformity and coherence. The needs of the foreign reader have, however, been given full consideration. Four separate tables have been appended, giving the equivalent German, English, Spanish and Italian word or phrase for those words and phrases contained in the *Dictionary* and placing alongside it the corresponding French word or phrase found in the text of the *Dictionary*.

The *Dictionary* has been prepared and published under the highest auspices. The original idea for producing such a book apparently came in 1934 from no less a person

than Judge Huber. It was taken up vigorously by M. Raestad, the great Norwegian authority on the law of the sea, and by the Norwegian Academy of Sciences and Letters. The project was then placed before the Union Académique Internationale, which established a Commission to supervise the preparation of the *Dictionary*. The personnel of the Commission has necessarily changed from time to time, and it may suffice to mention that it included, in addition to M. Raestad, its Chairman, such distinguished international lawyers as MM. Anzilotti, Basdevant, Jonkheer van Eysinga, Huber, Manley O. Hudson, Sir Cecil Hurst, Pilotti, Charles De Visscher. A large number of international lawyers have contributed to the preparation of the *Dictionary*, including M. Lopéz Oliván, the Registrar of the International Court, and other members of the Secretariat of the Court. The *Dictionary* in its final stages has been under the guiding hand of Judge Basdevant, who contributes a preface. In short, the *Dictionary* is a co-operative effort of a large circle of jurists from different countries, with the support of such bodies as the Rockefeller Foundation, U.N.E.S.C.O., and the Centre nationale de la recherche scientifique, in addition to the Norwegian Academy of Sciences and Letters already mentioned and to the Union Académique Internationale, under whose patronage it is published.

The proof of a dictionary is only to be had by referring to it for enlightenment on the meaning of particular words or phrases. The present reviewer has therefore thought to test the *Dictionnaire de la terminologie du droit international* by looking up in it a few sample words or phrases whose definition or interpretation is not entirely straightforward.

The first that came to mind was the word *ressortissant* which has no single equivalent in the English language, and here the dictionary proved entirely helpful. After defining the word *ressortir* as meaning in a very general sense: 'relever de tel État, de telle autorité', with an apt illustration from one of the Geneva Conventions of 1949, the *Dictionary* states that the substantive *ressortissant*, although it may sometimes be used in that wide sense in diplomatic or legal documents, has a lesser meaning. Then five distinct uses of the word *ressortissant* in legal practice are given, with supporting passages to justify each stated use, one of which is peculiar to the post-1918 practice of French tribunals. The dictionary then justly concludes that the term *ressortissant* has not acquired a single precise meaning in international law and that it is necessary, whenever this word is employed, to indicate the particular sense which it is intended to have. By way of underlining the need for precision it points out that in a passage in the *Mavrommatis Palestine Concessions* judgment (Series A, No. 2, p. 12) the French words *nationaux*, *siens* and *ressortissants* are all rendered in the English text by the word 'subjects'.

Recalling the critical importance given by the late Sir Hersch Lauterpacht to the word 'intervene' in the 'domestic jurisdiction' reservation in Article 2 (7) of the Charter, the reviewer next turned to the word *intervention*. On this word the *Dictionary* is helpful up to a point, but leaves the reader much where he was on the particular problem of its meaning in Article 2 (7). After saying that in its general sense the term intervention 'désigne l'action d'un État qui prend place dans l'examen et la solution d'une affaire relevant de la compétence d'un ou de plusieurs autres États', the *Dictionary* adds that the particular meaning of the word varies according to the way in which it is employed. These particular meanings are then said to include the following:

'A. — Terme employé parfois pour désigner semblable action quand l'État qui l'exerce prétend faire reconnaître que son droit ou son intérêt est affecté par la décision prise par un autre État dans l'exercise de sa compétence et à faire ainsi passer une affaire du plan

national sur le plan international: cas de l'action d'un État exerçant la protection de ses nationaux à l'étranger. . .

'B. — Terme employé parfois pour désigner l'action d'un État proposant ou exerçant ses bons offices ou sa médiation entre États que divise un différend ou qu'oppose un conflit ou pour leur rappeler les moyens de règlement pacifique qui s'offrent à eux ou leur donner, à cet égard, de simples conseils de modération. . .

'C. — Terme employé d'ordinaire, spécialement quand on pose la question de la légitimité de l'intervention ou du principe d'intervention ou, à l'opposé, de non-intervention, pour désigner l'action impérative d'un ou de plusieurs États qui, par pression diplomatique, usage de la force ou menace d'en user, imposent ou cherchent à imposer leurs vues à un autre État dans une affaire relevant de la compétence de celui-ci, en particulier dans une affaire d'ordre intérieur. . .

'D. — Terme qualifiant un acte de force accompli par un État sur le territoire d'un autre État. — A propos d'une opération de déminage effectuée dans le canal de Corfou par la marine britannique sous la protection d'une importante force navale de couverture, en vue, était-il allégué, de se procurer des preuves à soumettre à la justice internationale, la C.I.J. Recueil, 1949, p. 35, a dit:. . .

'E. — Terme employé parfois pour désigner l'influence que, par voie de propagande, d'appui donné à un parti politique, à des organes de presse, etc., un État cherche à exercer sur la politique d'un autre État.

'F. — Terme employé, sans autre précision, pour viser et écarter dans certaines affaires l'action des Nations Unies, par l'article 2, § 7, de la Charte. . .

'G. — Incident de procédure par lequel un État vient prendre place dans une instance arbitrale ou judiciaire liée entre d'autres États et qui est prévue par l'article 84, § 2, de la C.I., La Haye, 18 octobre 1907 et les articles 62 et 63 du Statut de la C.I.J.'

These meanings of 'intervention' are illustrated by citations from Max Huber, Pradier-Fodéré, Yepes, Dupuis, from the Court's Statute and from its judgment in the *Corfu Channel* case, but not from Lauterpacht or from any of the English-language writers on whom he relied. The cryptic utterance of the *Dictionary* on 'intervention' in Article 2 (7) of the Charter: 'Terme employé, sans autre précision, pour viser et écarter dans certaines affaires l'action des Nations Unies', clearly does not advance the interpretation of that clause at all. Perhaps, however, it is an inevitable limitation of a *Dictionary* that it should remain inscrutable as the Sphinx in face of a controversial phrase.

Even so, the *Dictionary* does seem to underline the need for caution in accepting Sir Hersch's proposition with reference to Article 2 (7) of the Charter that 'intervention is a technical term of, on the whole, unequivocal connotation' signifying 'dictatorial interference in the sense of action amounting to a denial of the independence of the State'. Sir Hersch's interpretation of 'intervention' by the United Nations under Article 2 (7) has not infrequently been invoked in the proceedings of the United Nations. But it has always seemed to the present reviewer a weakness of Sir Hersch's exposition of Article 2 (7) that 'intervention' does not have, as he appeared to assume, a single 'technical' meaning but, as the *Dictionary* shows, several meanings, of which 'dictatorial interference' is only one. Indeed, one of the commonest uses of the word is that mentioned in paragraph A of the *Dictionary*, namely, in the phrase 'diplomatic intervention for the protection of nationals'. The *Dictionary*, therefore, while remaining reticent about the meaning to be attributed to intervention in Article 2 (7), may be found to make some contribution to the question.

Recognition is dealt with elaborately under some eighteen separate titles: *reconnaître*, *reconnaissance*, *reconnaissance comme insurgés*, *reconnaissance comme nation* (given as referring to recognition of national movements such as the Polish and Czech national movements in the 1914–18 war); *reconnaissance de belligérence*, *reconnaissance de facto*,

&c. The central definition of recognition as generally used in international law is found under the title *reconnaître* as one of the eight meanings attributed to this word. The definition reads as follows:

'E. — D'une manière plus précise et avec le sens technique qu'il a en droit international, terme employé pour énoncer qu'un État ne conteste pas mais accepte la position prise par un autre État au sujet d'une situation donnée, spécialement d'une situation nouvelle; au lieu d'une divergence de vues, on se trouve alors en présence d'une vue commune fournissant la base sur laquelle s'établira le régime juridique futur. C'est dans ce sens qu'on emploie le terme quand on parle de reconnaître un État, un gouvernement, l'indépendance d'un État, etc. . . . et que l'on parle, à ce propos, de reconnaissance.'

This definition is not perhaps very pointed and some may prefer the rendering in paragraph B of the title *reconnaissance*:

'B. — Sens ordinaire de ce terme dans les rapports internationaux: Acte par lequel un État, constatant l'existence de certains faits (un État nouveau, un Gouvernement, une situation, un traité, etc.), déclare ou admet implicitement qu'il les considère comme des éléments sur lesquels seront établis ses rapports juridiques, cela avec les modalités explicites ou implicites que peut comporter cette reconnaissance.'

The various meanings of *reconnaissance* are illustrated by citations and one is perhaps a little surprised to find that Sir Hersch is only quoted in a somewhat special treatment of recognition of a new situation.

Rebus sic stantibus is perhaps too difficult a legal problem for satisfactory handling in a dictionary, and the present *Dictionary* is not as helpful on this phrase as it is on many others. The treatment of the phrase is comparatively brief and the only illustration given is a passage from Dupuis's *Hague Academy Lectures*. Another title which may not give full satisfaction to the user of the *Dictionary* is 'Principes généraux de droit reconnus par les nations civilisées'. It is preceded by a careful account of the general principles of international law, and some reference to the question how far there is any overlap between that expression and 'general principles of law recognised by civilised nations' might have been desirable. For in some quarters there is a tendency to run the two expressions together. Here again one is a little surprised to find no reference to Sir Hersch Lauterpacht or to Lord McNair's illuminating explanation of the concept of general principles of law in the *Status of South West Africa* Advisory Opinion.[1] 'Domestic jurisdiction', which is dealt with under two brief titles, *compétence exclusive* and *compétence nationale*, is perhaps another point where the *Dictionary* may seem to take refuge in brevity in face of a complex term. The only references are to Article 15 (8) of the Covenant and Article 2 (7) of the Charter, no mention being made even of the *Nationality Decrees in Tunis and Morocco*[2] Advisory Opinion or of the 1954 Resolutions of the Institute of International Law. A number of other test words or phrases, such as *déni de justice*, have been consulted, and in the majority of cases the *Dictionary* has been found to give a large measure of satisfaction. The reviewer was interested and, in view of the appearance of the term in the Charter and other treaties, a little surprised, to discover that 'self-determination' is altogether missing from the *Dictionary*. It may be suspected that this was an accidental rather than a deliberate omission and that critics of the phrase would be going too far if they were to invoke the *Dictionary* as authority for the view that the term has no place in the language of international law.

The *Dictionary*, as has already been stated, is written throughout in French. It is also fair to say that the French character of the *Dictionary* extends very largely to the

[1] *I.C.J. Reports*, 1950, 128, at p. 148.

[2] (1923), Series B, No. 4.

sources used for supporting and illustrating its definitions and interpretations of the words and phrases included in it. Certainly, some citations from Anglo-Saxon sources are to be found, but the balance is heavily in favour of French sources, prominent amongst which are Dupuis and Charles De Visscher. No one would wish to question the quality of these sources. Nor would it be reasonable to overlook the complications of constructing a dictionary on the basis of multilingual sources; if more use is to be made of English sources, why not also German, Spanish and Italian? Nevertheless, the Anglo-Saxon user of the *Dictionary* is bound to feel that a somewhat greater use might have been made of English-language sources in a dictionary designed to be an international dictionary for international use. To mention only the most prominent English authorities of recent times, Oppenheim, Brierly, Lauterpacht and McNair, Brierly is drawn upon in a number of places, McNair and Lauterpacht on rare occasions, while the reviewer has yet to come across a single reference to Oppenheim's *International Law*, the book which is most consulted in the chanceries of the world. Yet Dupuis's *Hague Academy Lectures* feature quite prominently in the *Dictionary*.

A work of this magnitude and of this complication is almost bound to invite criticism from one direction or another, and it would be quite wrong to allow the few criticisms made above to obscure the reality of the achievement of those who have produced this first international *Dictionary of the Terminology of International Law*. The production of such a dictionary is an almost super-human task and all those responsible for it are to be congratulated on its successful completion. Every library with any claim to provide an international law library will now inevitably include the new *Dictionary*, and the *Dictionary* is also likely to find a place in the personal libraries of many international lawyers. A law dictionary of this calibre, whilst it cannot legitimately be expected either to solve controversial problems or to expound points of law, is certain to prove a very useful guide, philosopher and friend to international lawyers.

C. H. M. WALDOCK

The Soviet Year Book of International Law, 1958. Moscow: Publishing House of the Academy of Sciences of the U.S.S.R. 1959, 563 pp.

Since 1917 the rest of the world has wondered, at times not without anxiety, how Soviet Russia would react to presently established ideas and institutions. Would it regard them all as tainted with bourgeois prejudice, would it accept some and reject others—or would an eventual compromise be reached? In the event, for international law as for other matters, the decisive factor appears to have been not purely ideological, but the swift rise in Russian strength; the need as a world power to play a part on many fronts has brought with it a more pragmatic as well as a more long range viewpoint, embracing the idea of law no less than that of economic development. The earliest writers would have swept away the past and built new, pure realms of Soviet equity—the latest jurists, whilst still treating law in Marxian terms, stress respect for sovereignty, the sanctity of treaties and the principles of coexistence. Within the confines of their system therefore, the Soviet lawyers are legalists, with a growing desire to express and to exchange their views.

On this basis, it is to be hoped that Western readers, particularly English jurists, will welcome the appearance of this volume, the first of an intended annual series to be published under the auspices of the newly formed Soviet Association of International Law. The editorial board, originally under the chairmanship of the late and regretted Judge Krylov, have ensured the publication of a substantial work running to some

600 pages. The majority of articles it may be noted are followed by a short summary in English, although the omission of the authorities cited in the original text somewhat reduces the value of this form of précis. Since the contents pages are in six languages, including Chinese, and footnotes are frequently in Latin as well as in Russian script, the whole work, despite a proportion of misprints, represents indeed something of a typographical *tour de force*.

As observed in the opening article by Professor Tunkin, appropriately entitled 'Forty Years of Co-Existence and International Law', no country, and, *ex hypothesi*, the Soviet Union could now deny the valid existence of international law, or the importance of mutual respect between States. Basing himself on the 'consensus' theories of international law, redefined so as to stress the 'co-ordination' rather than the 'identity' of state wills, he emphasizes the necessity that States should tolerate each other on grounds of sovereign equality. The need for such respect is indeed a recurrent motif throughout the volume, also mentioned for example by Korovin ('Proletarian Internationalism and International Law'), whose article serves to indicate the greater similarity of intention and interest to be found in relations between the various People's Democracies, as opposed to the more old fashioned 'superior-inferior' attitude adopted between developed and undeveloped countries. This would appear a convenient place to mention the highly informative commentary by Boguslavsky and Rubanov, 'Legal Cooperation between the U.S.S.R. and the People's Democracies'. This provides a detailed account of the legal aid treaties existing between the countries concerned and the wide range of public and private law matters they embrace. Under the general principle of treating the alien on terms of equality with the national, two groups of more specific rules have been evolved, governing respectively jurisdiction (in general determined by the courts of the forum), and choice of law (in general determined by the *lex patriae*). This article which provides a new picture for English lawyers of a post-war legal development, will be of interest both to historians of private international law and to comparative lawyers. Other points which deserve special mention include the fact that under these treaties, requests for co-operation between different judicial authorities no longer need to go through the respective Ministries of Foreign Affairs, but may be sent and acted on directly, and also that the various treaties of extradition make no exception for the case of 'political' offences—indeed no distinction is accepted between a crime against the socialist state, and against an individual citizen.

The article by Koretsky, 'The Problem of the Fundamental Rights and Duties of States in International Law', contains an attempt, reflected in several articles, to equate or replace those principles with the *Pancha Shila* or ten principles of Bandung. In the process the notions of natural law receive a fierce attack as being too often subject to bourgeois and Catholic manipulation, through their avowedly subjective content. To this the reply may be made that Marxism, founded on social protest, may similarly be regarded as drawing its strength from individual subjective impulse, although likewise shaped to doctrinal ends. The author further asserts that the present so-called capitalist States are now decrying sovereignty as part of their policy to maintain or secure world domination. However if—as the writer also asserts—the socialist states are growing stronger, what reasoning can lie behind this reaction? It would appear better and more accurate to recognize that sovereignty (witness the article referred to above on legal co-operation amongst the People's Democracies) is everywhere declining on a regional basis, as one of the many conditions of continued international coexistence. At the same time, the author of this article makes a very real endeavour to resolve a perennial

but ever elusive problem; assuming States to possess certain fundamental rights, from what legal order are these derived and what legal characteristic do they share which renders them basic? Certain of the reasons which prevent a purely legal answer being given to this question, are suggested by Shurshalov, in a forthright article on the juridical content of the principle *pacta sunt servanda*. Since treaties are, for Russian lawyers, by far the most important source of international law, the broad agreement expressed with the views and conditions enumerated by Sir Gerald Fitzmaurice in his work as rapporteur to the International Law Commission may be regarded as a happy augury for future progress in this field.

The articles on war and disarmament, whilst perhaps those which will be examined most eagerly, are also those which may cause most disappointment to the reader, hopeful that the world's troubles are at an immediate end. Frequently the views expressed appear rigid and time-worn, inviting the habitual *tu quoque* rejoinder of the post-war conference table. However, more optimistic facets of the situation are also exposed, suggesting that fresh means of escape from the diplomatic *impasse* may yet be found. Bogdanov in his article 'Disarmament in the Light of International Law', for example, argues that the reduction and regulation of armaments may now be regarded as principles of international law, by virtue of Articles 11 and 26 of the Charter and supporting resolutions of the Security Council and General Assembly. The authors of two articles on neutrality and non-intervention also base their reasoning on the Charter, as an expression of ultimate principles, whilst paying due heed to the example of Austria and similar instances of the post-Charter evolution of the United Nations.

Much of the final significance and value of this volume may be found to reside in those articles which comment in some detail on a specific matter of current interest. In 'Artificial Satellites and International Law', for example, Kovalev and Cheprov present what one may assume is a fairly authoritative expression of current Russian legal opinion on the subject. On the crucial question of how far national sovereignty and jurisdiction may be claimed to extend, the solution proffered is based on the twin factors of national security and effective control, rather than on those of a rigid spatial delimitation. Larin in 'International Cooperation on the Peaceful Uses of Atomic Energy', gives details of the bilateral treaties of atomic assistance concluded by Russia, of the twelve-nation research institute established at Dubna near Moscow, and of Soviet support for the International Atomic Energy Agency. In an examination of the application of the International Labour Conventions, Ivanov scrutinizes, and in general praises, the review procedure of this, the oldest means of securing municipal observance of international standards. This list, moreover, is merely illustrative of some of the more striking commentaries and by no means exhaustive of them. One further article which does, however, require particular mention, is that by Shebanov, dealing with the study of international law in the Soviet Union. This provides details of the system of teaching international law which is now an obligatory subject for each of the 37,000 Russian law students; the equivalent to post graduate courses are pursued notably at Moscow, Kiev and Leningrad, where the wide syllabus includes an intensive study of foreign languages as well as of the functioning of international organizations and international relations.

No single conclusion, no short additional phrase can, perhaps, easily be found to summarize the impression given by this work as a whole. If one final reflection may be ventured however, it is that in many cases remarks are made which reveal a lack of comprehension, or a lack of sophistication in the attribution of motives, when referring to views opposed to those of the author. Since the editorial board are kind enough to

invite comments and proposals, perhaps one may be permitted to suggest that, rather than encourage recriminatory (and equally contradictory) articles elsewhere, the Soviet Association of International Law might contemplate the publication of written debates. Stanford University, for example, is accused at one point of giving an inaccurate account of Soviet treaty practice; is it definitely and finally to be concluded that no agreed scientific assessment of this matter can ever take place? The new Association might also consider more ambitious plans to encourage scholarly research on an international footing. In Great Britain, to go no farther afield, learned bodies are presently engaged in studying, *inter alia*, the law of outer space and the operation of international military and police forces. Within the context of present-day politics and also, one may add, present treaties of cultural exchange, might not these be good topics on which to organize discussion on an international, and to that extent more realistic, basis? After all, it is not so very long ago since Oppenheim learnt a great deal from Martens, and the world of scholarship was more truly seen to be universal.

M. J. L. Hardy

Varia Juris Gentium—Liber Amicorum Presented to J. P. A. François. Leyden: A. W. Sijthoff, 1959. 427 pp.

This book, prepared by the editors of the *Netherlands International Law Review*, consists of thirty-five short articles on different aspects of international law written by colleagues and friends of Professor J. P. A. François and presented to him in honour of his seventieth birthday. The fact that distinguished jurists from some twelve different countries have combined to pay tribute to François in this way is a sufficient testimony of the high esteem in which he is held by international lawyers everywhere. Certainly, few men alive today can claim to have made so solid a contribution to the development of international law. For the whole of his long working life has been dedicated to the practice, study and teaching of international law.

The first article is a biographical note by Mme Kluyver, formerly of the Netherlands Ministry of Foreign Affairs, in which she reminds us that François began to specialize in international law in 1914 under Professor Van Eysinga, who was afterwards a judge of the Permanent Court of International Justice and who, happily, has contributed a paper to the present volume. Joining the Netherlands Foreign Office in 1915 as a junior official, François had his baptism as a practitioner in the manifold problems of Dutch neutrality during the First World War. In 1920 he participated in the conferences from which emerged the draft of the Statute of the Permanent Court of International Justice and went to the first Assembly of the League of Nations as a member of the Netherlands delegation, afterwards attending every other meeting of the Assembly except the dissolution meeting in 1946. Always active in the general legal work of the League, he was made a member of the small and select preparatory Committee of the 1930 Codification Conference. At the Conference itself he was rapporteur of one of the committees on territorial waters—a prelude to the important role played by him as rapporteur on territorial waters and on the high seas in the International Law Commission. Ever since 1922 François had been secretary-treasurer of the Council of Management of the Carnegie Foundation entrusted with the administration of the Peace Palace and in 1940, when the German forces overran Holland, he took up residence in a small house within its garden and constituted himself the guardian of the international status of the Peace Palace throughout the period of the occupation.

Late in 1945 François attended the Preparatory Commission for establishing the United Nations and in 1946 the Paris Conference at which the peace treaties with

Italy, Hungary, Bulgaria and Roumania were drawn up. At the General Assembly sessions of 1947 and 1948 he played a leading role in the drafting of the Statute of the International Law Commission and was elected as one of its first members. That François has made a major contribution to the work of the International Law Commission, over which he presided in 1953, is everywhere recognized. For his sound scholarship and patient determination as rapporteur was largely responsible for the completion of the Commission's drafts on the law of territorial waters and the régime of the high seas which achieved such a substantial measure of approval at the Geneva Conference of 1958. The role played by François in the formulation of the new conventions on the law of the sea will by itself ensure that his name is long remembered amongst international lawyers.

François happily found it possible to combine a substantial amount of academic work with his practice in the Netherlands Foreign Office. As early as 1920 he was appointed professor extraordinary of international law in the *École des Hautes Études Commerciales* (afterwards *Économiques*) at Rotterdam, a post which he held for almost forty years. It also goes without saying that, as a member of the council of administration of the Carnegie Endowment, he has for nearly as long played an active part in the work of The Hague Academy of International Law. His *Manual of International Law*, published in Dutch in two volumes in 1931 and 1933 respectively, formed the basis of his Hague Academy lectures in 1939. Elected to the Institute of International Law in 1937, he presided over its Amsterdam session twenty years later. On retiring from the Ministry of Foreign Affairs at the age of 65, François was appointed Secretary-General of the Permanent Court of Arbitration and in that capacity has been most active in reminding Governments of the existence of this tribunal and in trying to revive its use. Indeed, in 1955 he devoted a course of lectures to the Permanent Court of Arbitration, its jurisprudence and its future.

Jurists of a more speculative turn of mind, like Lauterpacht and Brierly, may have made more arresting and more widely known contributions to the modern science of international law. But the international law of today owes much to the solid contributions of men who, as legal advisers to their Governments and as writers, patiently build and develop its fabric. Mme Kluyver's biographical note convincingly shows the pre-eminent contribution made by the man in whose honour this book has been prepared and published.

Nine of the other papers are written in the Dutch language. Four of these Dutch-language papers are accompanied by summaries either in English or French. Professor Kollewijn criticizes the application in the conditions of today of a decision of the Netherlands *Cour de Cassation* in 1907 to the effect that divorce is a matter of *ordre public* with the result that it must always be governed by the Netherlands law of divorce to the exclusion of the national law of the spouses. H. F. Van Panhuys examines the status and nationality in international law of commercial corporations and other private associations, with particular reference to the provisions of the 1956 Netherlands-American Treaty of Friendship, Commerce and Navigation. W. Riphagen discusses what he terms the 'concentration' and the 'delegation' of powers in the law of international institutions. The ideas dealt with in this paper are somewhat complex, and it is not easy to appreciate them without a study of the Dutch text. Professor Tammes makes a plea for the creation of a new high-level international organ for the finding of facts distinct both from the Court and from the Security Council. The remaining five Dutch-language papers—by N. S. Blom, H. Fortuin, Professor Van Hamel, Professor Röling and J. D. Schepers—have no summaries in French or English attached

to them, and for that reason they must remain for many readers, as for the reviewer, a tantalizing mystery.

Turning now to the papers written in French or English, five deal with treaty questions. L. ERADES challenges the opinion expressed in 1937 by Telders that under the Netherlands Constitution promulgation is the act whereby international agreements are transformed into Netherlands municipal law and that unpromulgated agreements, even if binding under international law, have no binding force under internal law. He considers that the criterion is rather whether the parties to a dispute had the possibility of knowing about the international agreement and its contents. Article 66 of the revised Constitution of 1953 provides that agreements shall only be binding on citizens in so far as they have been *published* but leaves the notion of 'publication' undefined. Nor is the matter carried any further by the revision in 1956 which merely restricts the operation of Article 66 to 'self-executing' agreements. BARON VAN ASBECK, in a closely packed and interesting paper, traces the evolution of non-judicial methods of international control to ensure compliance with treaty obligations. He divides these methods into three broad types, (*a*) 'co-national control', i.e. mutual control of each party's activities by the contracting Governments, as for example in the Sugar Convention of 1902; (*b*) 'international control', i.e. control by multi-membered international organizations such as the International Labour Organization and many of the Specialized Agencies, a feature of which is often the part played by experts in the mechanics of control; and (*c*) 'supra-national control', i.e. control by representative international assemblies with a parliamentary procedure, such as the Council of Europe and the European Economic Community. He refers to the provision made in some cases for visits of inspection to the country concerned and for the submission of complaints, and sees in all these developments the germs of a true common administration of the common interests of the peoples of the world.

VAN DER GOES VAN DER NATERS contributes a stimulating paper on the revision of 'supra-national' treaties, in which he makes a powerful case for the view that, when a treaty creating an international organization establishes special procedures for its own revision, these special procedures prevail over the ordinary rules of international law for the revision of treaties, so that it is no longer open to the contracting Governments to vary the treaty by the ordinary procedure of a second treaty *concluded through the diplomatic channel outside the organization.* He makes the text for his study of this problem the revision clauses of the European Coal and Steel Community Treaty and the subsequent revisions of this Treaty. He cites in support of his thesis—and in opposition to the view originally taken by the Netherlands Government—several opinions of writers and might, perhaps, also have invoked as a precedent the procedure adopted for the dissolution of the League of Nations.

LORD MCNAIR, in a terse and strongly argued paper, takes the view that, leaving aside a limited class of 'public law' treaties, it cannot be regarded as established that international law recognizes a general principle under which a stipulation in favour of a third State may, with legal effect, be invoked by the latter. He points out what is not always noticed by writers, that the Court's observations in the *Free Zones* case on stipulations in favour of third States were in the nature of an *obiter dictum.* Although this is indisputable, it may not be unreasonable to attribute rather more significance to an *obiter dictum* in a judgment of the majority in the World Court than in judgments in municipal tribunals. The last of this group of papers contains extremely pertinent observations by PROFESSOR CHARLES DE VISSCHER on the so-called textual interpretation of treaties. Having stressed the priority that an international judge must give to the

text as the external expression of the intentions of the parties and as the guarantee against the distortion of their intentions, he points out that, on the other hand, there is really no question of a purely literal or grammatical interpretation of the text. For every treaty has to be and is read in the social context in which it was made—in relation not merely to the fundamental relations between States but to the object of the particular treaty and to the state of the international law in force at the time. This does not, however, mean that it is admissible to allow a teleological approach to distort the clear language of a text, and it is principally in treaties establishing international institutions that teleological interpretation has an important role. The rules of interpretation inherited from Vattel have a certain part to play in international law as a logical apparatus serving the interests of good faith and reason but, as Vattel himself emphasized, the different rules interact upon each other and must be applied in combination, carefully balancing the indications resulting from each rule. Professor De Visscher draws on his own long experience as an international judge, and the paper contains a number of penetrating observations which will surely soon find their way into the pleadings of counsel and the judgments of tribunals.

Three papers deal with the law of the sea and of these two concern the conservation of the living resources of the sea. Dr. Van der Molen, after briefly tracing the history of the doctrine of the freedom of the seas, discusses the principle of 'abstention', which the United States and Canada sought unsuccessfully to introduce into the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. The theory of this alleged principle is that (1) a fishery must be stabilized at its level of maximum yield which will be diminished if fishing is allowed beyond this level, and (2) coastal States which have maintained the productivity of the fish stocks through expenditure on research and management should have a prior right to exploit the fishery, while others—at least those which have not been exploiting it during the previous five years—should be required to abstain. Dr. Van der Molen considers that this 'principle' would be a thin disguise to extending the rights of a coastal State over the high seas and that its adoption would weaken resistance to the exorbitant claims made by some States to vast areas of territorial waters. The writer therefore regards it as ill-advised on the part of the United States and Canada to advocate this new doctrine since it brings into dispute one of the few principles of the law of the sea accorded general recognition, namely, freedom of fishery on the high seas. Judge Spiropoulos in another paper provides a lucid exposition of the main provisions of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, pointing out that, apart from minor modifications and additions, the text of the Convention follows that elaborated by the International Law Commission. He stresses the novelty of the conservation provisions and underlines that they lay a duty as well as confer a right on the coastal State to take conservation measures. The third paper in this group is an interesting examination by Professor Sörensen of one of the problems left unresolved by the Geneva Conference of 1958, namely, the rules governing the delimitation of the territorial waters of mid-ocean archipelagos. Having recalled that at the abortive 1930 Codification Conference no distinction was made between the rules applicable to coastal and mid-ocean archipelagos, he reviews the handling of the question in the International Law Commission and the Geneva Conference. He observes that at the Conference 'the disagreement as to what the law is was just as great as divergences as to what the law should be' and dissents from the view of Sir Gerald Fitzmaurice that the question of groups of islands was resolved by Article 10 (2) of the Territorial Sea Convention which states that the territorial sea of an island is

measured in accordance with the provisions of the Articles of the Convention. Then he explains the complexities of the problem and sets out the considerations which he thinks should be taken into account in trying to arrive at a decision in a given case. Having regard to the lacuna left on this point by the Geneva Conference definite conclusions are scarcely possible, but it is safe to assume that Professor Sörensen's careful analysis of the question will be resorted to by anyone confronted with the delimitation of the territorial sea of ocean archipelagos.

Four papers touch upon matters on the borderlands of international and municipal law. Professor Hambro explores the question how far, if at all, international law has developed rules with respect to conflict of laws. He notes that a conflict of laws has hardly ever been the subject of diplomatic intervention, but suggests that there may be indications of international rules in the jurisprudence of international tribunals, especially of mixed arbitral tribunals. Recognizing that Dr. Lipstein reached the conclusion that no international rules of conflict of laws emerge from the large body of decisions of the tribunals set up after the First World War, he still believes that evidence may be found of the application, if not of customary rules, of 'general principles of law'. Professor Makarov discusses the right of option in international conventions in cases of double nationality. Having observed that Article 6 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws adopted at the 1930 Codification Conference does not go much beyond the provisions normally found in the nationality laws of municipal systems, he draws attention to option provisions in recent treaties. Article 8 of the Arab League Convention on Nationality provides for a right of option for persons possessing the nationality of two States of the League. A treaty of 1955, as yet unratified, between Communist China and Indonesia also contains elaborate provisions concerning the right of persons to opt between the nationalities of the Contracting Parties. Finally, in 1957 and 1958 a large number of treaties providing for a right of option was concluded by the Soviet Union with all the European Communist States and also with North Korea. In the absence of information concerning the application of these Communist treaties the writer, while setting out their principal provisions, maintains a certain reserve as to the real significance of this development. Professor Verdross contributes a forceful paper on the protection of private property under what he terms 'quasi-international agreements'. Whatever may be the position concerning the expropriation of foreign private property *acquired under the municipal law of the expropriating State*, he regards property acquired by a foreigner under an agreement concluded directly with a Government as a special case. Like the Swiss Government in the *Losinger & Co.* case, he considers that the principle *pacta sunt servanda* is valid, not only for agreements between States, but also for those between States and foreign nationals. The law applicable to these 'quasi-international' agreements is the *lex contractus* and is the municipal law of the State concerned only if and to the extent that the *lex contractus* so provides. On this basis, it is not open to the State simply to invoke 'public utility' as a ground for setting aside the agreement—unless the *lex contractus* so allows. Normally, alteration of a 'quasi-international' agreement is only permissible by mutual agreement or *force majeure*. Professor Verdross finally maintains that the award in the *Radio Corporation of America* v. *Czechoslovakia* case supports his views because the tribunal there held that, even if the *lex contractus* brings in the municipal law of the State *in toto*, a mere assertion of a 'public interest of vital importance' would not suffice to allow the setting aside of the contract. The question whether such a 'public interest of vital importance' exists was one to be decided either by mutual agreement or by the arbitral tribunal contemplated in the

contract. In the fourth paper of this category PROFESSOR BEAUFORT explains briefly the operation of the European Convention of Human Rights, both in the domestic forums of the contracting States and in the international forums of the Commission and Court established by the Convention.

Another group of four papers deals with various aspects of the pacific settlement of disputes, two of them prompted by the European Convention of 1957. PROFESSOR WEHBERG makes a critical study of the provisions of the European Convention, comparing them with the corresponding provisions of the General Act of Geneva of 1928. The main difference, he finds, is that, whereas under the General Act the basic minimum of obligation is the acceptance of compulsory submission of disputes to conciliation, the basic minimum under the European Convention is the acceptance of the compulsory jurisdiction of the International Court of Justice with regard to legal disputes. He points out what seems to be a retrograde step in the European Convention, that acceptance of an obligation to submit disputes to conciliation is optional. He also expresses doubts about the formula in Article 26 setting out the powers conferred upon arbitral tribunals for deciding non-legal disputes which he considers to be ill-drawn. PROFESSOR ROLIN too expresses doubts about the provisions of the European Convention relating to compulsory arbitration of non-legal disputes, and they are doubts of a more substantial kind. He questions the validity of the whole notion—adopted in the European Convention—of the compulsory arbitration of non-legal disputes *ex aequo et bono* without any apparent obligation on the part of the arbitrator first to have regard to customary international law or general principles of law. He points out that the provisions of the General Act of 1928, which did not go as far as this, remained a dead letter, and prophesies the same fate for this part of the European Convention. It is time, he says, that the idea that arbitration is a universal panacea was abandoned. In a paper on the decisions of the International Court in 1957 and 1958 PROFESSOR VERZIJL summarizes the judgment in the *Norwegian Loans*[1] case, comments upon the *Right of Passage over Indian Territory* (*Preliminary Objections*) judgment, and discusses the *Interhandel* case, both the interim measures of protection decision and the judgment on the preliminary objections. The paper contains an interesting analysis of the views of the judges concerning what Judge Lauterpacht, not altogether happily, termed the 'automatic' form of domestic jurisdiction reservation and which Professor Verzijl prefers to call 'a clause of sovereign appraisal'. The remaining paper is a brief review by W. J. M. VAN EYSINGA of the trends in the attitudes of States towards compulsory adjudication, lamenting that they now seem to have returned to the position where all that they will accept is 'une obligation, à moins qu'on ne désire pas être obligé'.

PROFESSORS SCELLE and QUINCY WRIGHT contribute papers on the treatment of war in the international legal system. Professor Scelle rapidly reviews the history of the efforts made to limit and outlaw aggressive war and concludes that, despite justified pessimism as to its efficacy, the law of the Charter prohibiting recourse to force is true constitutional law of the international community. He sees in the United Nations the cradle of a future federal system but warns us that we may have to wait until the newly emerging States have had their taste and their fill of national sovereignty before further progress in the direction of a world federal State can be made. Professor Quincy Wright concentrates rather upon the position of an aggressor State under the laws of war and under the Charter. While recognizing that the law must not discriminate between the

[1] He had previously subjected this case to detailed analysis in Vol. IV of the *Nederlands Tijdschrift Voor Internationaal Recht.*

aggressor and his victim in the application of the rules for humanizing war, he strongly contends that in other respects international law must today discriminate against the aggressor and that such discrimination would be of practical value in helping to deter an aggressor State or to prevent it from being successful. He pleads, in short, for discrimination against the aggressor with respect to legal powers and permissions, but not with respect to legal obligations and prohibitions.

Franc tireur warfare is the subject of an interesting paper by PROFESSOR CASTBERG, who concedes that a *franc tireur* may be tried and shot by the occupying Power as an offender against its own criminal laws, but questions whether he can be said to have committed a crime under international law—a war crime. The point, which is a delicate one, has more than once been raised in 'war crimes' or 'collaborator' cases before the Norwegian Supreme Court without a very clear line being taken by the Court. Professor Castberg 'leans to the opinion that the closest concord with the purpose of The Hague Rules and with legal development during and after World War II is attained if resistance that is unprotected by international law is nevertheless accepted as compatible with international law'.

JUDGE ALFARO and PROFESSOR BOURQUIN write on diplomacy. The former rapidly surveys the different conceptions of diplomacy and reaches the broad conclusion that the commonly accepted ideals of diplomacy today are on a higher moral plane than they used to be in the era before the League of Nations. Professor Bourquin, on the other hand, writes of the decline of the diplomatic *method*. Secret bilateral diplomacy has largely given place to public collective diplomacy. No doubt, this was a necessary evolution because today almost every important international question is of a collective, not to say world, character. No doubt, also, public debate has its value in diplomacy as a means of bringing the pressure of public opinion to bear upon the interested parties. But confidential negotiation is absolutely essential for achieving the adjustment of most international problems, and modern collective diplomacy has so far failed to produce any systematic method of *confidential* negotiation. Private discussions in the corridors of conference buildings, in hotels at private dinner parties, are a vital, if casual, expedient, but the development of a more systematic technique of confidential negotiation is now urgent.

The four remaining papers touch upon modern problems. MR. STUYT briefly considers the teleological aspects of international law with special reference to communist and non-communist concepts of peace and to the different concepts of prosperity in developed and undeveloped countries. MR. DE WINTER makes a powerful plea that the Western democracies should in their own interest support the Special United Nations Fund for the Development of Underdeveloped Countries (S.U.N.F.E.D.), whilst recognizing the reality of the obstacle created by the financial and political conditions in some of these countries. PROFESSOR BOS discusses the problem of adapting the traditional—European—system of international law so as to bring about a genuinely universal system acceptable to the new States of Africa and Asia. He opposes Professor Röling's solution of virtually scrapping the traditional system in favour of a new system based on the United Nations, and expresses a strong preference for the adaptation and evolution of the traditional system by introducing into it appropriate elements from Afro-Asian systems of law along the lines advocated by Dr. Jenks. Finally, DR. JENKS himself draws attention to the potential risks to human beings involved in new scientific or technological developments, whether in nuclear energy, the exploration of space, or other fields, and urges States to establish in good time appropriate legal principles and legal machinery to obviate these risks. Drawing upon existing international arrangements

in atomic energy, meteorology, Antarctic research, &c., as well as upon principles and institutions of private law, Dr. Jenks sketches in broad outline possible legal principles and machinery to provide reasonable controls in the interests of the world community, while allowing proper scope for scientific research and experiment. The ideas in this paper are at once imaginative and constructive.

All in all, the papers collected in this volume represent a most worthy tribute to the distinguished jurist in whose honour they have been written.

C. H. M. Waldock

The Doctrine of Equality of States as Applied in International Organizations. By Bengt Broms. Vammala: Vammalan Kirjapaino Oy. 1959. xxxi + 348 pp.

In this work, which comprises the author's dissertation for the degree of Doctor of Laws in the University of Helsinki, he examines the doctrine of equality of States with special reference to international organizations. He begins by considering the doctrine of equality in general, both in municipal and international law. He then turns to the opinions of legal writers on the doctrine of equality of States, discussing also in this connexion the doctrine of sovereignty. The rest of the book falls conveniently into four different sections. First, the author takes up the question of the problem of equality of States at international conferences prior to the League of Nations. Secondly, he investigates the doctrine of equality of States as applied in the League of Nations. Thirdly, he considers the doctrine as applied in the United Nations. Lastly, there is an inquiry into the doctrine of equality as applied in present-day organizations outside the United Nations, with special reference to international administrative organizations, the Inter-American international organization, the League of Arab States, the Council of Europe and the Northern Council. The author ends by considering the doctrine as applied in the international judicial organization.

As the work is not written in the author's own language, he is to be congratulated on his fluent and lucid style, which makes the book eminently readable. One may, however, express slight surprise at finding, in a work written in English, one of this country's better-known medieval philosophers referred to as 'Wilhelm von Occam' (p. 25). Doctor Broms has read widely and deeply both in the doctrine and in the official reports of United Nations, and is to be commended on the extent of his research.

Nevertheless, the book is on the whole, it must be admitted, disappointing. In the first place, the author's interest in matters on the fringe of the problem of State equality has prevented him from confining himself to the problem in hand. For example, in the very first chapter there is an excursus on the problem of the basis of obligation of international law, to which seven pages (pp. 7–14) are devoted. Interesting and important as this question is, its relevance to the problem of the equality of States is dubious; the author himself does little to explain why this matter should be discussed. Further, whether or not this digression is irrelevant, it can scarcely be regarded as an adequate treatment of the problem. With regard to the legal writers, it is clear that the author has studied their views with care and thoroughness. After a short glance at the doctrine of equality of States in the ancient and medieval worlds he traces the emergence of the doctrine of equality from Vitoria and Suarez to the present day. In his attempt, however, not to overlook any writer who contributed thought to this question, he tends to let the work degenerate into a catalogue of writers' views. Is there really any point in including five lines on Klüber, four lines on Halleck, six lines on Pradier-Fodéré and

Rivier, three on Heffter and six on Holtzendorff (pp. 41–42)? A better course, it is believed, would have been to examine the notion of equality in the light of competing theories rather than with reference to the different views of individual authors. There is much too which could be omitted from the chapters dealing with the United Nations, in particular, much of the discussion on the wrangle over the admission of new members, not all of which is relevant to the central problem of equality.

The book also seems to the present reviewer to fail to elucidate adequately the concept of equality. He distinguishes rightly between the principle of equality before the law and the principle of equality of rights and duties of States; and with regard to the latter he further differentiates the idea of equality of rights from the equality of capacity for rights, pointing out that though the actual quantity of rights and duties of States may differ widely, this does not mean that States do not possess equal capacity for rights and duties. His thesis is concerned to discover to what extent equal capacity for rights and duties results in actual equality of States, in the light of the functions of international organizations. There seems, however, to be some lack of clarity with regard to the notion of equal capacity for rights and duties. All citizens of a State, he claims (p. 18), can be said to possess equal capacity for rights and duties. But this is not so. In English law there still remains the personal immunity of the monarch. Membership of the House of Commons is closed to peers and peeresses in their own right and to lunatics and idiots; and nothing that these two classes of persons can do will increase their capacity for rights to overcome these disqualifications. In the United States the post of President is closed to naturalized citizens, who therefore have a capacity for rights inferior to that of natural born citizens. These two cases provide us with examples not merely of inequality of rights but of inequality of ability to obtain rights. In fact the author should consider more fully what it means to say that all citizens of a State are equal; he should have investigated how far this is a proposition of law within the given State, how far it is a factual statement and how far it is a mere plea that citizens ought to be treated equally.

Closely connected with the doctrine of equality of States is the doctrine of sovereignty. On this topic the author includes an interesting chapter comparing and contrasting the two concepts. He is not entirely clear, however, it is submitted, on the meaning of sovereignty. Having adopted an authoritative statement on the notion of sovereignty delivered by Judge Huber in the *Island of Palmas* case, to the effect that sovereignty in the relations between States signifies independence and that independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State, the author then submits that sovereignty is primarily connected with the internal aspects of States. A State could still be sovereign, he maintains (p. 76), if it were the only one in existence. What this means is far from plain. Confusion perhaps arises from a failure to distinguish between the sovereignty of a State and a sovereignty of the legislative organ within that State.

The conclusion must therefore be that, despite the author's considerable research and interesting discussion of many points, this book is not really a satisfying treatment of the central problem of the doctrine of equality of States. P. J. FITZGERALD

Legal Problems Involved in the Corfu Channel Incident. By IL YUNG CHUNG. Geneva: Droz, 1959. 287 pp. No price stated.

The author of this scholarly study cites the *Corfu Channel* case as an example of the 'depoliticalization' of an international situation by recourse to judicial settlement.

Although the case may certainly be so regarded, it must also be remembered that the prime motive behind Albania's initial, if half-hearted, willingness to appear before the International Court was her desire to appear to be a properly 'peace-loving' state fit for membership of the United Nations; when hopes of such membership declined, so did Albania's desire to persevere with judicial remedies. Thus even on the political level is to be found that mingling of ends with means and of substance with evidence which forms so large a part of the interest of the case. It is to the great credit of Mr. Chung that throughout his examination of the many twists and turns of the case, the thread of his arguments is kept taut and his pages maintain their readability.

The book falls naturally into three parts: the opening describes the circumstances of the various voyages, the mining of the *Saumarez* and the *Volage*, the resulting mine-sweeping operation, the appeal to the Security Council and its eventual recommendation. The second part deals with Albania's preliminary objection and the Court's acceptance of the Albanian Government's letter of 2 June 1947 as a sufficient foundation of jurisdiction by way of *forum prorogatum*. The third and major portion of the book consists of the arguments raised in the Court's consideration of the merits of the dispute. The conclusion of a Special Agreement, only a matter of hours before the Court's decision upon the question of jurisdiction, is well brought out—an odd feature of the case which again finds its underlying explanation in extra-legal factors. Be that as it may, the two questions which the parties put to the Court determined the scope of the rest of the proceedings and the exact phrasing of the questions assumed considerable importance.

One of the author's most careful and intelligent chapters concerns the problems of evidence with which the Court had to grapple in a form which was new to it. Instead of being asked to give a legal ruling upon largely agreed facts, the Court was here asked firstly to decide which of the two parties' accounts of the causes of the incident was correct. Since Albania, by the nature of her defence, denied prior knowledge of the mines or minelaying, Counsel for the United Kingdom had necessarily to establish such knowledge on a basis of cumulative circumstantial evidence. That the Court accepted this evidence, having also examined the technical questions involved with the aid of its own expert inquiry, is well known. However, because of the way such indirect evidence almost invariably causes the burden of proof (or of disproof) to swing towards the defendant (not for nothing did Sir Frank Soskice dwell on the parallel with the *res ipsa loquitur* doctrine in English law—but what must the defendant do there to disprove the charge against him?), the Court was reluctant to specify too explicitly what rules of evidence and what standards of proof it would accept. Indeed, the position is almost the contrary; the Court expressly declared that the mere fact of a State's control over territory did not in itself involve prima facie responsibility or shift the burden of proof, and appeared thereby to accept the theory of 'no liability without fault'. However, as Mr. Chung points out, the Court's actual decision was inconsistent with this general dictum. Having satisfied itself of Albania's knowledge of what, if proved, was an international wrong, it eventually held Albania liable for not discharging the obligations imposed by that knowledge.

The Court's observations on the claimed right of passage and its unanimous finding against the United Kingdom's intervention to collect the *corpora delicti* are then considered, together with the Court's persistence despite Albania's non-appearance in assessing the amount of compensation. By this stage, however, some three years had passed since the original incidents, the political climate had changed and it no longer seemed worth-while to the Albanian Government to cultivate the good opinion of the

International Court. When the British Government, in the course of its efforts to obtain payment of the damages awarded in its favour, sought to attach monetary gold assumed to belong to Albania and also claimed by Italy, the Albanian Government refused to play any part in the proceedings before the Court.

Mr. Chung may be congratulated once more on having provided us with a lucid and stimulating study of a case which has proved such a rich quarry of material in the spheres of evidence and procedure, no less than for the law of the sea and the law regulating the use of force.

M. J. L. Hardy

The Saar Conflict 1945–1955. By Jacques Freymond. Published under the auspices of the Carnegie Endowment for International Peace. English edition. London: Stevens & Sons Ltd.; New York: Frederick A. Praeger. Inc. 1960. xxviii+395 pp. Bibliography: maps: tables. 50*s*.

Studies of the 'causes' of wars are legion; less has been done to see what can be made of the study of international conflicts that have found a peaceful solution. The present case-study is the first of five such inquiries being conducted under the general editorship of John Goormaghtigh, the director of the European Centre of the Carnegie Endowment who promises a concluding volume to bring together the lessons thus derived. It is an ambitious project and it is not clear whether the material is sufficiently comparable for much beyond generalities to be forthcoming. The other conflicts under consideration are the Franco-Moroccan conflict, the Trieste conflict, the Cyprus conflict and the Anglo-Iranian conflict. It is clear that the Saar and Trieste questions being substantially territorial disputes between two pairs of sovereign States have something in common. But in Morocco it was a case of 'colonialism', and the Anglo-Iranian dispute probably also falls into this category despite the fact that sovereign States were involved. Cyprus is, finally, rather a hybrid.

However, we must not prejudge the results. What one is entitled to ask is how useful in this context M. Freymond's study is likely to be.

One can say at once that it is as one might expect both scholarly and impartial. Swiss neutrality has never shown to better advantage. But there have been some rather questionable decisions as to method. M. Freymond divides his book into two halves; an historical narrative of the question as it developed between the end of the war and the decision to allow the Saar to return to Germany after the rejection by its population of the proposed 'European statute', and secondly, an analysis of the respective parts played by individual figures, pressure groups and parties, 'public opinion', and the general international context is making for the ultimate resolution of the conflict.

M. Freymond has in my view performed the second part of his task more satisfactorily than the first. If the book is to be used as a 'case-study' it should contain within its covers all the non-specialist on the particular conflict needs to know about it. This condition is far from being met here. No account, however brief, is given of the vicissitudes of the Saar before 1945 and in particular in the inter-war years, the influence of which must have been profound particularly on the Saarlanders themselves. There is no account of the Saar's economy and no systematic investigation of its role from the French or German viewpoint. Again, there is no systematic account of the legal basis or actual forms of the régime set up by the French in the Saar (though there is much information tucked away in the appendixes) and no proper analysis of the successive agreements made with the Saar, or later with the Germans, nor of the

proposed European statute. This makes the diplomatic narrative exceedingly hard to follow at times, since proposals are argued about by the contestants the content of which the reader can only find out about from other sources. Similarly, the importance of the dispute about the Roechling family and its properties is suddenly intruded into the discussion at a point at which nothing has been said as to who the Roechlings were, why they were significant, or what steps had been taken in the matter hitherto.

No doubt a mere historian would have taken a narrower view of his assignment than M. Freymond and been unable to use with advantage the modern tools of public-opinion polls, content-analysis and so forth; the international lawyer might have produced a dry-as-dust compilation neglecting all but formal public sources—this is not history or law, but 'political science', or 'international relations'; it will, however, be a pity (and I think defeat the object of the series) if we can only get the advantage of the new methods by sacrificing certain qualities of the more traditional disciplines.

M. Freymond's analysis is, nevertheless, of great interest and throws a lot of new light not only upon the Saar question but upon the whole of France's 'European' policy with all its many (and still unresolved ambiguities) within which the relatively limited problem of the Saar had to find its solution. Whether it should properly be described as a 'case-study' may be regarded as an open question at least until the companion volumes appear.

MAX BELOFF

The Case Law of the International Court, Volume II. By EDVARD HAMBRO. Leyden: A. W. Sijthoff's Publishing Company, 1960. vii+376 pp. 32.50 fl.

Readers of this *Year Book* will already be familiar with Volume I of Hambro's *Case Law of the International Court*, which contains 511 citations from the judgments, advisory opinions and orders of the Permanent Court of International Justice and of the present International Court up to and including 1951. That volume provided international lawyers with a most useful 'repertoire' of the jurisprudence of the Court, and the primary object of the second volume is simply to bring that Repertoire more up-to-date by adding to it 195 citations from the Court's judgments, opinions and orders in the period 1952–8 inclusive. Following the scheme of the first volume, this volume also has (*a*) a full list of all the decisions given by the Court in the period 1952–8, and (*b*) a comprehensive bibliography of the books, articles and documents relating to the Court's work and published during the same period. Although the basic plan of this volume is the same as for the first, there is a larger measure of subdivision in the titles. The author explains that the detailed subdivision of the material to some extent reveals his personal opinions and that, still being in the service of the Court, he did not feel able to carry it so far in the first volume.

Everyone is likely to have his own views as to exactly how to divide and subdivide the subject-matter of international law in arranging a book of this kind. The arrangement adopted by Professor Hambro has the merit of being relatively clear and simple, so that the book is easily used for ready reference. The present reviewer did, however, feel it a little surprising that the general rules concerning advisory opinions are placed under 'International Organizations' rather than under the International Court of Justice. A number of the advisory opinions clearly relate to the substantive law of international organizations, and are rightly placed under that title. The general principles concerning advisory opinions, including such matters as the question the consent of interested States and the Court's obligation to reply to a request for an opinion,

and even still more the procedure, would seem essentially to belong to the section dealing with the International Court of Justice. Be that as it may, the book has a useful index, as well as a full table of contents, so that there is no difficulty in finding fairly quickly whatever citation may be wanted.

The author indicates that it is proposed to add further volumes to the series, and expresses the hope that in due course a consolidated volume will be published. Hambro's *Case Law of the International Court* has proved a useful addition to the libraries of international lawyers, as is demonstrated by the fact that the first volume had to be reprinted in 1958. The proposal that further volumes are to be provided and eventually a consolidated volume, is therefore one to be welcomed. C. H. M. WALDOCK

International Control of Nuclear Maritime Activities. By LEE HYDERMAN and WILLIAM H. BERMAN. Ann Arbor: University of Michigan, 1960. xix+384 pp. $4.50 and $6.00.

The authors' aim in preparing this work has been to illustrate the legal problems which will arise from nuclear maritime activities and to show how necessary some international control of these activities will be. As they point out, the shadows of future disputes have already appeared. At a recent conference for example, organized by the International Atomic Energy Agency, the Soviet Union announced firmly that the disposal of radio-active wastes in the sea was illegal; the United Kingdom promptly observed that this would entail the non-utilization of nuclear energy for industrial purposes by many countries which, like itself, possess a large population and only a small land area.

The first part of the book sets out the various technical problems which will be encountered by any attempt to control the three principal aspects of nuclear maritime activities—the transport of radio-active materials, the disposal of nuclear wastes and the operation of nuclear-powered ships. A consignor of radio-active materials must not only deal with a number of scientific difficulties relating to the safe 'containment' or 'shielding' of a nuclear cargo, but is also usually responsible for ensuring that safety conditions satisfy the multiplicity of different national regulations. Although a number of expert panels have been set up by regional and international bodies to consider ways of eliminating this inconvenience, no comprehensive set of international regulations has yet gained wide recognition. Here, as in the question of the disposal of nuclear wastes, the obviously ideal solution lies in the establishment of an international body whose inspection certificates—whether of cargoes or of monitored sea areas—are accorded universal acceptance. The authors provide some interesting background information of the growing study of oceanology, as well as of the varying effects upon marine life of the disposal of radio-active wastes by either 'pipelines' or 'bulk' methods. Turning to nuclear-powered ships, a number of similar problems arise; the various States of the world may develop—indeed are already developing—differing safety and control standards. International supervision will in any case be doubly necessary here if nuclear ships are to enter foreign ports freely without also endangering the safety of the local population.

After this introduction, the authors examine the law of the sea and the different ways in which nuclear activities may impinge upon it. The authors suggest that the paramount considerations of public safety and security will probably enable coastal states to maintain adequate control over inland and territorial waters. The right of innocent passage, for example, is not dependent on the absence of intention alone; it must be

'inoffensive' as regards any of the pertinent regulations of the littoral state. Nuclear ships in distress must exercise the right to come ashore with caution and with due reciprocity of humanitarian considerations. However, it is the control of nuclear activities taking place on or beneath the high seas which presents the most difficult problem under existing theories, whichever nuclear activity is being considered. There is a general duty under customary international law not to cause harm to others; does this obligation give rise to a corresponding right to prevent or forestall others doing harm, particularly when those others are acting outside the bounds of national jurisdiction? In dealing with this well-known jurisprudential problem the authors look first to the grounds on which jurisdiction and control have previously been exercised over maritime activities. The fundamental principle behind health, customs, defence and similar regulations in the authors' opinion is that of effectiveness. To place this in turn on a wider basis, they then discuss the international and domestic law of nuisance and the possibility of injunctive relief being given by an international tribunal. The authors seem a little uncertain in their handling of this portion of the book; the concentration on maritime analogies has perhaps prevented them from realizing the full scope of the jurisprudential field which was open to them.

The crux of the debate may perhaps be related to the fundamental question the authors themselves raise: is a nuclear-powered ship merely a ship with a special form of propulsion or is it in essence a floating power station from another State? If the first approach is adopted, it becomes logical to contrast existing maritime precedents—oil pollution, the extent of the continuous zone under the 1958 Geneva Convention, fishery conservation measures and so forth—with nuclear proposals. However, the more thoroughly the authors establish the inadequacies of the present law of the sea when faced with these proposals, the more clearly it becomes suggested to the reader that not only is some new international step necessary, but also that the full range of the problem, both legal and technical, can best be seen by looking outside the law of the sea altogether. Not only do the authors pay little regard to previous legal experience of industrial risks, but they make only passing reference to many of the pertinent nuclear precedents which it would have been instructive to examine in greater detail: the control provisions of the large number of bilateral treaties which have so far governed international trade for example; the corresponding portions of the arrangements made by the International Atomic Energy Agency to assist member States; and a number of European developments, from health to insurance, which might prove practical even on a wider basis. In the concluding section entitled 'Approaching a Rule of Law' the authors develop their proposals for a system of international control founded on a number of multilateral conventions to be concluded under the auspices of the International Atomic Energy Agency. These proposals prove in fact to be excellent and worthy of the fullest consideration. Their formulation, however, appears to have no direct link to the bulk of the preceding text. Thus the final impression given by the book is that though the authors' underlying purpose and conclusions are sound, their concentration on the law of the sea has given an uneven effect to the overall product. If the authors had chosen to assume or to have stated more briefly the inadequacies of international maritime law, a broader approach to an undeniable problem would have been possible, together with a more vigorous exposition of the full range of practical solutions which might yet be advocated by different states. The authors may rest assured, however, that when the time comes, as it surely must, for international consideration of a system to regulate nuclear maritime activities, their pioneer study will prove to have been of valuable assistance.

M. J. L. HARDY

Introduction to International Law. Present Conceptions of International Law in Theory and Practice. By MAREK ST. KOROWICZ. The Hague: Martinus Nijhoff. 424 pp. 25.65 fl.

In this important and refreshing book, the author, formerly Professor of International Law in the University of Cracow and now a Research Professor at the Fletcher School of Law and Diplomacy, modestly admits that 'to write a textbook of international law is in our own time a very difficult thing' (p. 20). International lawyers, he thinks, have taken far too long to realize that an attempt by one man to cover in a single work the whole of international law leads merely to the production of an amateurish encyclopedia, and that, from the point of view of writing textbooks, as well as the organization of chairs in universities, it is time that international law were split up as municipal law has long been. There is some interest in the divisions which Professor Korowicz proposes. These are maritime law; air law; international arbitration and judicial settlement; the law of warfare and neutrality; international political organization; administrative organizations and international agencies; disarmament; international crimes and their repression, &c.

Professor Korowicz confines his aim to writing not so much a standard textbook as a study of the present conceptions of international law as expressed in legal literature, international treaties and other agreements, international judgments and awards, governmental and diplomatic statements and the like. He frankly admits to attaching more importance to 'the teachings of the most highly qualified publicists of the various nations' than is fashionable today. To this end he begins with a consideration of the definitions of international law formulated by many of these publicists. He criticizes definitions (e.g. those of Le Fur, Strupp and Rousseau) which, he maintains, define international law in terms of itself since in one form or another such definitions tend merely to say that international law is a body of rules governing relations between the various subjects of international law. This, however, is only a reflection of the difficulty of delimiting precisely the scope of international law, once it is admitted that that system of law is no longer applicable to States alone. As a matter of interest, Professor Korowicz's own definition, taken from his book *La Souveraineté des états et l'avenir du droit international* (Paris, 1945) is as follows: 'Public international law is the body of rules which govern mutual relations of States and the situations of other collectivities as well as of organizations and individuals, which are not subject to the internal legal order of a State.' It could hardly be pretended that this is the last word in clarity. Indeed, Professor Korowicz admits that the attempt to define international law succinctly is a fruitless task. What is needed is rather a definition of the fundamental notions of international law amongst which he includes the following: the State and its basic rights under international law; subjects of international law; sovereignty; independence; equality; domestic jurisdiction; and the nation under international law.

The book then develops a number of variations on the theme of sovereignty and equality. Professor Korowicz considers the dominant or traditional doctrine since the end of the eighteenth century to have been that 'which maintains that international law is a body of rules governing the intercourse of independent States, and that sovereignty means the supreme power of the State inside its territory and its independence of any external authority' (p. 51). He distinguishes, on the one hand, those who preach an absolute sovereignty of the State, which is not controlled by any international law at all, and, on the other hand, those who would virtually suppress the traditional notion of sovereignty altogether. While this survey of doctrine will be found useful by

specialists, it inevitably leads to a wide measure of generalization. Thus, it is stated that 'In Great Britain, the "right wing" of the followers of the traditional conceptions . . . who reluctantly accept restrictions on sovereignty, and do not recognize any instance in which individuals might become subjects of international law, differ in their opinions from those who look toward the ever greater scope of international law at the expense of sovereignty, ranging from Westlake to Brierly' (pp. 108–9). Although the picture is perhaps recognizable, few would agree that the different nuances employed by various British writers in relation to the problems of State sovereignty and the status of the individual represent quite such an articulate division of opinion as this manner of writing inevitably tends to suggest. Particularly to be welcomed, however, are Professor Korowicz's chapters on the Soviet conception of sovereignty and international law, and on the problem of domestic jurisdiction. The latter chapter stands out as one of the most satisfactory essays on a difficult subject since the late Sir Hersch Lauterpacht dealt with it in his *International Law and Human Rights* (London, 1950).

A problem to which Professor Korowicz devotes considerable attention is that of subjects of international law other than States. Particularly interesting, and much illumined by his central European background, is his treatment of the development of the principle of self-determination of peoples from the early days of Abbé Grégoire's Draft Declaration (1793), through Mancini's Turin lectures on 'Nationality as the Foundation of the Law of Nations' (1851), to President Wilson's 'Fourteen Points' and Mount Vernon speech (1918), and the United Nations Charter (1945). His conclusion, however, that the right of self-determination is a principle of international law is open to doubt. Such doubt would seem to be reinforced by the author's own analysis—unusual, but welcome, in a treatise on international law—of the theories of Fichte, Mazzini, Renan, Schmidt-Rohr and other exponents of the principle of nationality, and of the manner in which those theories have been abused. Professor Korowicz himself considers language as the most important objective criterion of nationality, but he probably exceeds his role as an international lawyer when he prognosticates the integration of the Arabs into a single federal or unitary State and the disintegration of India and Indonesia into several States. Timely, however, is his warning that the principle of nationality easily degenerates into an offensive nationalism and that the assertion of the primacy of nationality over citizenship could easily lead again, as it did in the time of Hitler, to the destruction of a stable international legal order.

Professor Korowicz's conscience revolts against the idea that individuals should be considered as objects of a legal system, whether it be municipal or international. Such an idea is, to him, undemocratic and tantamount to equating individuals with slaves. His basic position is that it does not follow that simply because an individual is not a full subject of international law, therefore he is an object of that law. According to Professor Korowicz, an individual is not an object of international law but is a subject of international law only in so far as the provisions of that law refer to him. A jurist, he says, is not a subject of the law concerning physicians; but that does not make him an object of municipal law or deprive him of his standing as a subject of municipal law. Professor Korowicz further maintains that international law may be regarded as that part of the municipal law of a State which is made through external, instead of internal, channels; and that the necessity for parliamentary ratification of treaties ensures as much democratic control over the external channel as there is over the internal channel. The chapter on this problem is perhaps not very convincing, though it contains some valuable observations on the working of the German–Polish Upper Silesia Convention of 1922.

D. H. N. Johnson

The Role of Nationality in International Law. By H. F. VAN PANHUYS. Leyden: A. W. Sijthoff, 1959. 256 pp. 19.95 fl.

This book, as the title suggests, is primarily concerned with the significance of nationality in international law. Reference to its significance before national tribunals, particularly in the field of private international law, although made in an interesting and to some extent novel way, is incidental. Again, and here Jonkheer van Panhuys's work differs from most of the literature on nationality in international law, consideration of the modes of acquisition and loss of nationality is relegated to a subsidiary position.

The first and larger part of this book is devoted to what the author refers to as a 'circular tour' of those areas of international law in which an individual's nationality is significant, and to an investigation of the nature of nationality in the light of the functions which it variously serves in these areas. The author makes use of material available up to 1 January 1959. But his work is no mere summary. He has a jurisprudential approach and he is ever alert to the possibility of wider implications when dealing with a specific problem. The main branches of international law in which nationality plays an important part, dealt with here, are the treatment of aliens (Chapter II), diplomatic protection (Chapter III), reprisals, collective sanctions and war (Chapter IV), criminal jurisdiction (Chapter V) and treaties (Chapter VI).

The author is, of course, conscious of the fact that the effects of nationality in international law cannot be sensibly evaluated in complete isolation from the rules governing its incidence. So he does look, although briefly, at the restrictions placed by international law upon the efficacy for its purposes of a state's nationality laws: 'the picture of the *function* of nationality would be incomplete if this aspect were not at least touched in with a few light strokes. In so doing—in Chapter VII—an endeavour has been made to review this set of problems also specifically in the light of the *function* of nationality' (pp. 22–23).

Part II comprises four chapters. In the first the author generalizes as to the traditional function of the concept of nationality in international law. In the second he makes some interesting comparisons between nationality in public and in private international law. The third is devoted to the impact of traditional notions of nationality upon an 'international man'—this meaning not only he who functions as an employee of an international organization, but also the ordinary individual who, as such, is coming to be recognized in some areas of international law, e.g. human rights. In the final chapter the author, taking a broad sweep, considers the nature of nationality with special reference to the chronology of its development. He concludes that although the concept of nationality becomes more and more sophisticated as international relations become fuller and more complex, ultimately as this full and complex interrelation merges into integration the importance of nationality will wither. The author sees the concept at the present day as nearing the end of its 'flowering period'. But the end has not yet been reached: 'The general concept of nationality—reflecting as it does the pattern of international (and largely inter-State) relations—should not, in the absence of a fully developed protection of individuals in their capacity of members of the international community, be lightly relinquished' (p. 238). At the same time he writes: 'it is to be hoped that mankind will not cease to strive for the establishment and development of a real international system of law, if possible in the shape of Grotius's *magna humana societas*. A glimpse of this new Jerusalem (without 'strangers') may be caught, though outside the strict ambit of international law, in the field of private international law, and as a result, in the role of nationality in this field' (p. 233).

This is an illuminating book which serious students of international law, private as

well as public, ought to read. Its relevance to public international law is obvious. To the private international lawyer many of the author's glancing remarks offer animate relief in the currently prevailing sterile aftermath of the late W. W. Cook's positivist revelations.

An English private international lawyer may, however, be permitted to express one small regret—that the decision in *In re Greaves deceased. The Times*, 29 March 1957, did not escape the author's attention. That was a case of succession to movables in which Harman J. (as he then was) appears to have applied English law as the national law of a British subject dying domiciled in Egypt. No reference was made to this in the subsequent edition of Dicey's *Conflict of Laws* and, to the best of the present reviewer's knowledge, it has escaped reporting except in *The Times* newspaper. But on page 197 Jonkheer van Panhuys reminds us of it.

The English style is very readable, although there are a few minor blemishes, e.g. infinitives are split on pages 57 and 236.

The reviewer's copy of the book is paper-backed but its physical production is nevertheless attractive. The paper is good and the type and layout have greater aesthetic merit than do those found in some English-produced law books. P. B. CARTER

The Minquiers and Ecrehos *Case. An Analysis of the Decision of the International Court of Justice.* By A. G. ROCHE. Geneva: Librairie Droz, 1959. 200 pp.

This book, a doctoral thesis submitted to the University of Geneva, has been published under the direction of Professor Guggenheim. It consists of two parts. In the first part the author analyses the general rules of international law relating to the acquisition of territory in the light of the *Minquiers and Ecrehos* case; in the second (and shorter) part he deals with certain problems which arose specifically from the *compromise* by which this case between the United Kingdom and France was submitted to the International Court of Justice.

When writing a book on a case decided by the International Court, it seems essential to choose between two possible methods. The first method would be to concentrate on the case itself. This method would call for a fairly wide study of the historical background, its importance for the parties, and the reasons which prompted them (or at least one of them) to seek a solution by judicial means. Such a study might go on to consider, and possibly criticize, the manner in which the parties conducted the proceedings before the Court, both the written statements and the oral hearings. It would analyse the techniques employed by both sides to adduce evidence as to the facts and also assess the relative merits of their legal arguments. Finally, it would appraise the collective judgment of the Court and also the separate and dissenting opinions of individual judges. While perhaps not requiring a marked degree of ability in research, this method can be relied upon to produce useful results, particularly in regard to the decisions of the International Court of Justice. The judgments of the Court, and of individual judges too, are widely read and commented upon. But few are those who take the trouble to immerse themselves in all the aspects of a case from beginning to end, or who even have facilities which would enable them to do so.

The second method would be to take that branch of international law to which the case in question seemed mostly to relate, and to consider the extent to which that particular branch of the law was either clarified or merely confirmed or possibly even confused by the decision of the Court. This method, which clearly calls for more ability

in the field of research, also has much to commend it. Nevertheless, it has certain dangers too. The first danger is that, if the decision of the Court was in any way inadequate, this will tend to be reflected in the book itself. Either the author will tend merely to reiterate the not very illuminating pronouncements of the Court, or he will be forced into the invidious (and faintly absurd) position of laying down the law himself and criticizing the Court for not following that view of the law. Another pitfall may be the tendency to magnify unduly the importance of the case as a precedent and to read into some of the Court's statements more than they really mean; in other words, to use the case merely as a peg on which to hang certain preconceived notions on the law. Rather than fall into this trap, it would of course be better frankly to write a book on the selected branch of international law itself instead of purporting to expound a particular decision of the Court.

Dr. Roche leaves us in no doubt that he preferred to choose the second method, with all its attendant risks, as of course he was perfectly entitled to do. He tells us, however, that the first method has been employed to some extent in regard to the *Minquiers and Ecrehos* case in a thesis submitted by another student to the University of Paris in 1956 (but apparently never published).

On the whole, Dr. Roche has not fallen into the traps referred to above, although the relative brevity of the Court's statements on the subject of the law relating to title to territory has naturally made it impossible for him to confine himself strictly to an analysis of the Court's own decision. In an introductory chapter he summarizes the law as, in his view, it stood prior to the *Minquiers and Ecrehos* case. This summary may be said to follow orthodox lines. It shows the importance of effectivity as an essential constituent element of sovereignty. It emphasizes that sovereignty may be based upon an originally licit act (occupation), in which case the lapse of time or the recognition of third parties is not a constitutive element. Or it may be based on an originally illicit act subsequently validated by the tacit or express recognition of third parties. 'Where the recognition is tacit', says the author, 'the time element is a constitutive factor, and the process is called prescription' (p. 51). Dr. Roche is therefore concerned to emphasize the difference between occupation and prescription and not to subsume the two, as some writers (and possibly some international tribunals) have done, under a general heading, such as 'consolidation'. However, he admits that 'there is need for a mode of acquisition which would fuse occupation and prescription and apply to cases where the root of a title is doubtful' (ibid.), and that in such cases the doctrine of consolidation may have a part to play.

It is Dr. Roche's view, elaborated in subsequent chapters, that the Court decided the *Minquiers and Ecrehos* case on the basis of consolidation. That he does not enthuse, however, over the manner in which this was done is evident from the following key passage:

> 'It will be immediately apparent that the judgment in the *Minquiers* case is not closely reasoned, and does not refer to the general principles of law applied. Almost invariably these general principles can only be revealed after a close analysis of the judgment. Therefore it is regrettable that the Court should not have stated expressly why it was not applying occupation or prescription to the case, and why it had adopted consolidation. It could also have availed itself of an ideal opportunity to elaborate the law applicable to cases decided on the basis of consolidation, for . . . one is obliged to make deductions from the judgment rather than accept or reject well-defined propositions.' (p. 63)

Experience shows, however, that it is useless to expect the Court to decide the disputes submitted to it on anything but a narrow basis; and still more useless to expect it to frame 'well-defined propositions' on international law in general.

A more specific criticism aimed at the Court by Dr. Roche is that, although the Court accepted the principles of the intertemporal law as expounded by Judge Huber in the *Island of Palmas* case, it spoiled its acceptance of those principles by devoting too much attention to the medieval aspect of the *Minquiers and Ecrehos* case. This, says Dr. Roche, 'will encourage the parties to future territorial disputes to delve into the mists of history to dig up arguments in their favour' (p. 87), thus complicating and lengthening international judicial proceedings. This censure seems exaggerated, and indeed undeserved. Quite apart from the fact that parties to international territorial disputes need no encouragement from the Court to 'dig up arguments in their favour', it was necessary for the Court in this case to examine the medieval aspect in order to determine whether or not one of the parties had an original title. For, even on Dr. Roche's own view of the law, it makes all the difference whether an original title can be proved or whether, the root of a title being doubtful, it is necessary to resort to some such doctrine as consolidation. In subsequent chapters Dr. Roche deals competently with the Court's attitude to the so-called 'critical date' in territorial disputes and towards the rules of evidence.

In the second part of the book, the author considers the situation which arose from the drafting of the *compromis* in such a way that the Court was requested to determine 'whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the *Minquiers and Ecrehos* groups respectively belongs to the United Kingdom or the French Republic'. At one stage in the case France raised the question whether the islets concerned might not be *res nullius* or under a condominium: but this possibility, in the United Kingdom view, was excluded by the *compromis*. The Court would seem to have supported the United Kingdom on this point. But Dr. Roche makes the serious allegation that, although the restrictions thus imposed on the Court probably did not affect the outcome of the litigation, they were 'inadmissible as imposing on the Court rules which it is not competent to apply' (p. 152) and even have the effect of detracting from the value of the judgment. As the author rightly points out, the imposition of alternative solutions upon international tribunals is nothing novel. It arose, for instance, before *ad hoc* tribunals, in such cases as *San Juan Boundary*, *Misiones Boundary*, *Chamizal* and *Island of Palmas*. It arose also before the International Court itself in the cases of *Delimitation of Territorial Waters between Castelorizo and Anatolia*, *Free Zones of Upper Savoy and the District of Gex* and *Sovereignty over Certain Frontier Land*. Dr. Roche considers carefully the courses open to international tribunals, when confronted by such a situation, and comes to the conclusion that, rather than, on the one hand, depart from the terms of the *compromis*, or, on the other hand, render a decision not deemed to be fully in accordance with general international law, a tribunal should take the extreme step of pronouncing a *non liquet*. Although brief, the second part is in some ways the most interesting portion of the book, and it is to be hoped that the draftsmen of future *compromis*, anxious though they may be to get their particular dispute settled one way or the other, will not overlook the valuable suggestions of Dr. Roche.

D. H. N. JOHNSON

Internationales Recht: Gesammelte Schriften und Vorlesungen. Band I; Das Recht des Völkerrechtlichen Gebietserwerbs. By WALTER SCHÄTZEL. Bonn: Ludwig Rohrscheid Verlag, 1959. 283 pp. No price stated.

In the course of the foreword to this, the first volume of his collected works, Professor Schätzel expresses his great regret that, in over fifty years of the practice, study

and teaching of international law, he has been unable, by force of circumstances, to find time for the preparation of a systematic treatise or handbook. His intention, therefore, in collecting together and publishing anew some of his most important monographs and articles written between 1919 and the present day, is to allow them to stand in place of a formal treatise and to convey some impression of his general philosophy of international law. The first volume is concerned with problems connected with the acquisition of title to territory and centres upon the law and practice of annexation. Volume II will contain articles upon the law of international courts and tribunals. Volume III will be devoted to a collection of the author's well-known studies of nationality law and Volume IV will complete the series with a group of studies on the law of war and analogous problems.

The volume under review has three parts. It opens with a short article on 'Völkerbund und Gebietserwerb' (pp. 11–34), which was originally published in 1919 in the series 'Monographien zum Völkerbund' and is now largely of historical interest. It is an assessment of the function and powers of the League of Nations as the final arbiter on questions of territorial sovereignty. Its thesis is an extension of the phrase so often met with in works of this period—*Die Staaten bilden eine Gemeinschaft*. Its argument is that once the community of nations (*Gemeinschaft*) is established under the aegis of the League then inevitably the problems traditionally associated with the doctrines of accession, of occupation, of cession and annexation, must lose much of their importance and will become amenable to organized international adjudication. In spite of the series of disillusionments suffered during the period of the League, this article still presents a most persuasive case and its conclusion finds an echo in Professor Schätzel's later writing on this subject:

'Der Völkerbund, nicht der kapitalistische, sondern der soziale, ist der große Friedensbringer, der Schlichter aller Gebiets- und sonstigen Streitfragen unter den Staaten, das soziale Ideal der internationalen Gemeinschaft' (p. 34).

The core of the book is the long monograph (pp. 35–247), first published in 1920 with a most perceptive introduction by Professor Walter Schücking, entitled 'Die Annexion im Völkerrecht'. This work has for long held a high place in the literature upon this subject and it is good to have it reproduced in this convenient form. Although basically a thorough and searching analysis of the rights and duties attaching to the annexation of territory after conquest or subjugation, it serves to illustrate again the author's view that the whole doctrine will become obsolete when a stable international organization becomes established. The monograph was written during the latter half of the First World War and has especially valuable comments on the future of international adjudication in this field (pp. 244–7) as well as a most useful conspectus of the historical evolution of claims to territory by annexation (pp. 40 et seq.).

The third part of the volume is taken up with an article on 'Die Annexion im Völkerrecht' which was published in *Archiv des Völkerrechts* in 1950 (vol. 2, pp. 1 et seq.). The reader is thus able to follow the progression of Professor Schätzel's thought on these matters up to the present day. In this last article, after an examination of changes in practice and doctrine, the author turns his attention to the idea of 'non-recognition' of territorial changes brought about by other than pacific means. He traces the development of this idea from the pronouncement of President Wilson in 1918—'. . . the day of conquest and aggrandisement has gone by'—through the stages of the Stimson doctrine (1932), the Atlantic Charter (1941) and the Charter of the United Nations. He believes that 'non-recognition' in its modern meaning must from part of the practice

of the United Nations—for this is the surest way towards the obsolescence of the doctrine of annexation.

The volume has consolidated indexes and a very useful list (pp. 279–80) of the most important international incidents arising from territorial disputes of the kind examined. All readers of this volume will look forward to the publication of the remainder of the series, which, as a whole, will surely form a fitting climax to the life's work of a most distinguished, and a most modest, jurist.

K. R. Simmonds

Wörterbuch des Völkerrechts. Second edition by Hans-Jürgen Schlochauer. Volume I. Berlin: Walter De Gruyter & Co., 1960. xix+800 pp. 160 DM.

The first edition of the *Wörterbuch des Volkerrechts und der Diplomatie*, as it was then styled, was published between 1924 and 1929. The work was founded and edited by Professor Karl Strupp; the appearance of the first volume in 1924 was an important landmark in the literature of international law in the German language. The publication now, thirty-six years later, of the first volume of a fine new edition is an event of the first importance to all students of the subject the world over. The first edition was in active preparation even before the commencement of the First World War and met with many delays and setbacks before publication was complete. We are promised with the new edition a work of three volumes, each of approximately 800 pages, of which the publication will be completed by 1962. Yet this is much more than a new edition, for it displays, when compared with the old *Wörterbuch*, such a fundamental change in treatment and in emphasis that it is almost completely transformed.

The first edition of the work set out to give a general conspectus of international law from its origins to the time of publication; the method employed was the presentation of short articles, in the form of monographs, each linked with a keyword. The selection of the keywords for the first edition showed a preponderant interest on the part of Professor Strupp and his colleagues in the exposition of rules and principles drawn from the law of treaties, especially from the Versailles agreements; there was also a disproportionate amount of material devoted to the history of doctrine. The new edition omits much of the purely historical or descriptive matter (e.g. States are now treated only in relation to particular incidents or judgments) and attempts to review the body of juristic literature as well as the most significant developments in recent State practice. The articles are more precise and more closely interrelated, so that, in the projected three volumes, over 1,200 keywords, of which 700 are entirely new, can be contained within the work. Over half of the keywords found in the first edition have not been transferred.

The volume under review includes the letters A to H ('Aachener Kongress–Hussar-Fall') and the list of distinguished contributors, the majority from German universities and institutes, bears witness to the range of interests, learning and experience upon which the learned editor has been able to call. The articles achieve a uniformly high standard of precision and lucidity; each one is accompanied by a short list of references for further reading and there is a full cross-citation between the keywords. The success of this pattern of authoritative analysis and succinct exposition must depend to a large extent upon the skill and imagination of the editing. In spite of the enormity of the task Professor Schlochauer has managed to invest the work with a unity and a vitality so often lacking in compendious works of reference; he has also written a useful

introduction (pp. iii et seq.) to the history and the use of the work, as well as a number of valuable contributions (e.g. on the Bryan Treaties, pp. 257–8).

It would be invidious to select at random examples from the other contributions for especial mention. The present reviewer was impressed with the balance preserved between articles on doctrine (e.g. Dr. Schaumann's stimulating account of the principles of recognition, pp. 47 et seq., and Professor Bindschedler's analysis of annexation and title to territory, pp. 68 et seq.) and articles on the international community and the regional organizations (e.g. Dr. Leyser's note on Formosa, p. 550, Dr. Klingmuller's account of the rise of the U.A.R., pp. 80 et seq., and the group of articles, by various hands, on the European institutions, pp. 448 et seq.). The work is especially comprehensive in its treatment of the jurisprudence of the International Court (with some noteworthy contributions by Dr. Bernhardt at pp. 35, 252, 406, 774, &c.) and includes a wide range of important municipal decisions (e.g. *Civil Air Transport* v. *Central Air Transport* (1952), at p. 288) from a number of countries. All of the contributions are informative and will provide either an immediate answer, in a readily accessible form, to a question of reference or will give useful guidance for more detailed research. Each volume may be used on its own, but the comprehensive set of tables outlined for the final volume will, of course, greatly facilitate the use of the work. The book is excellently produced and is a pleasure to read and to handle. The remaining volumes will be eagerly awaited, for the *Strupp–Schlochauer* '*Wörterbuch*' will surely prove to be a standard work of reference and definition. All international lawyers owe a considerable debt of gratitude to Professor Schlochauer, to his co-editors (Professors Kruger, Mosler and Scheuner), to the *Deutsche Gesellschaft für Völkerrecht*, and to the Publishers for undertaking after so long an interval of time the publication of this new and reformed edition.

K. R. Simmonds

A Manual of International Law. By Georg Schwarzenberger. Fourth edition in two volumes. London: Stevens & Sons Ltd., 1960. xviii+819 pp. £4. 4*s*. 0*d*.

This edition of the *Manual* is nearly twice as big and more than twice as expensive as the third edition. The text itself has been 'enlarged into a medium-sized presentation of international law' which now fills the first volume: there is, on the whole, an excellent balance in this volume between outline and detail, law and speculation. Study Outlines (much expanded), Reading for Further Reference, Glossary and texts take up the second volume.

The text is not merely fuller. Certain changes and new views are incorporated; these are listed at p. viii. Among them are emphasis on the three perspectives in which the subject can be viewed, on the seven fundamental principles of international customary law and on the four different types of rules of warfare. These examples are chosen from many because they illustrate what is both a virtue and a vice of the whole book, namely, a habit of analysis and numbering which makes for easy note-taking and remembering but may also be said to do too much for the beginner and make it hard for him to form his own views. For example, it is helpful to know that the decisions of international courts, which come first in the hierarchy of law-determining agencies when those agencies are subjected to the 'threefold scrutiny' prescribed at p. 31, must be critically studied 'primarily, in the light of the (three) established rules governing the (seven) fundamental principles of international law, and, secondly, (of) the three perspectives of

international law' (p. 33); but, pressed too far, this sort of method can drive out common sense.

Dr. Schwarzenberger argues and analyses with great power. Yet at times his choice of terms is puzzling. Rules of international customary law are said to be a law-making process; in what sense can a rule of law be a process for making law? The seven fundamental principles of international law are given as sovereignty, recognition, consent, good faith, self-defence, international responsibility and the freedom of the seas; which of these is a principle in the usual meaning of the word?

The expansion of the text raises a major problem. It is now big enough to form a suitable basic textbook for a university student. How is he to use it? In particular, how is he to bridge the gap between the text and the study outlines? The propositions of law in the text are, after all, said to be based on international judicial and Anglo-American practice; yet authority is seldom given, and the footnotes are all cross-references to other parts of the text or study outlines. Even the most docile reader must sometimes want authority for a proposition dogmatically asserted, perhaps even reference to an article on some contentious point. The study outlines are based on specific questions which may not be those in the mind of the reader, and the reading lists given there are vast: readers are 'to pick and choose among them according to their own predilections' (p. 386), but this is cold comfort to a beginner. Some illustrations of the difficulty may be given. Self-defence is discussed at p. 172 where it is said that 'in the *Corfu Channel* (*Merits*) case (1949), the International Court of Justice further contributed to the elucidation of these rules'. The footnote reference leads to study outlines, where the case is mentioned with its usual reference, but no specific lead is given to the discussion therein of self-defence. The extracts in Green's companion *Case Book* say nothing of self-defence: is the student to read through the whole case? Reservations to declarations under the Optional Clause are considered at p. 239, and there is a paragraph which refers to the *jurisprudence constante* of Sir Hersch Lauterpacht on this point. The footnote reference is to p. 628 (given as p. 629) where several I.C.J. decisions are mentioned; it is impossible to tell which of them is in question. Discovery and contiguity are mentioned once each, in a sentence on p. 116; they are not defined or explained, and there is no reference at all for these topics. These difficulties could be very simply avoided by the addition to the text of a limited number of precise footnotes leading to the authorities. The first volume (if available separately, which at present it is not) would then be a stimulating and self-contained textbook for beginners.

G. D. G. Hall

Le Organizzazioni Internazionali. By Angelo Piero Sereni. Milan: Giuffrè, 1959. xxviii+317 pp. 2,000 lire.

As the preface indicates, the present book forms one portion of the second part of the second volume of the author's extensive treatise on international law, the main characteristics of which were discussed in this *Year Book*, 33 (1957), p. 377. It must be pointed out, at the outset, that this is not an account of the structure and function of individual international organizations. Such an account is promised by the author as a complement to the present volume. Instead, it is the first attempt, it would seem, to present in systematic form the general principles which may be said to have been developed with increasing speed and complexity over the last forty years by the instruments which have created international organizations, and by these organizations themselves. In short, the author has described the general part of the law relating to

international organizations. Once again, particular international law is evolving general principles, but the pace whereby such principles acquire general validity is continuously becoming faster.

The book is divided into ten chapters, of which the last two, devoted to the powers and organs of international organizations, form the second half of the volume. The author examines first the methods and forms of these organizations as means of co-operation in the sphere of international, as distinct from municipal, law otherwise than by means of representation and common organs. The diversity of forms invites new types of classification which are necessarily individual in character, and the distinction between international institutions, described as being often temporary and without international personality, on the one hand, and international organizations on the other hand, may not be readily acceptable, the more so since the author admits that the distinction is quantitative, rather than qualitative, if the international organization also lacks international personality. Having defined the nature of an international organization, he discusses briefly the legal nature of the relationship of international organizations to States and persons or entities not possessing international personality. He then turns to the instrument creating the organization and examines its bearing upon the States forming parties to it and upon their law. In particular he notes the limited functions and the particular nature of international organizations, denying the possibility of universality, having regard to the legal structure of the international community. He analyses the restrictions upon their functions as to objects, space or as to both, the question of whether they are open or closed societies, and the conditions of admission to, and loss of, membership. The chapters dealing with the stable character, the purposes, the exercise of functions and the internal regulations of the organizations make up the core of the first half of the book, seeing that the author's definition establishes continuity and special purposes as the cornerstones of his system. Continuity, not permanence, and effectiveness determine its existence, and not the possession of legal personality; the extinction of an organization is complete and questions of succession cannot arise as such. The status of international personality is only important in so far as it attributes to the organization rights and duties under international law, but whether or not international law applies, the entity may possess some legal personality, and even if international law does apply, the entity may not enjoy this status. This is a problem of convenience, not of legal theory. However, the overlap between States and international organizations, being international entities, may create interesting situations, if the functional purposes of the entity are combined with direct territorial powers over individuals. Yet, at the present stage, these purposes (which are determined by the agreement of States) have remained strictly limited, so as to be complementary to those of States, but within these limits the object may be general or special. To carry it out, the organization may, in exceptional circumstances, exercise certain functions which operate directly in regard to individuals and State territory (as in the case of aid to refugees), but even when operating through or with States the organization fulfils public functions, and its conduct must be determined by principles drawn from the law of public services. At the same time the exercise of these functions must not be impeded, but the general rules of international law governing immunity from local jurisdiction cannot apply automatically, and the creation of special agreements on functional immunities has become necessary. At this stage the author examines in detail the various types of functions which are being exercised by international organizations, of which he discusses nine categories, and draws attention to certain dangers of overlap, given the unco-ordinated growth of organizations, and to the

techniques by which such frictions are overcome. The regulation of their internal structure is autonomous even in those cases where the organization does not enjoy legal personality in international law. In substance the regulations are strictly functional, having regard to the characteristics of such organizations. For this reason it is difficult to determine their operation in space. They equally defy any classification based upon distinctions between legislative and other acts, or upon an enumeration of the parties to whom they are addressed. Having regard to their basis in agreements forming particular international law, they incorporate the latter.

The powers of an organization are strictly defined by its functions, but they may include the competence to determine its own jurisdiction. Different techniques govern the process of the emendation and revision of the instrument which created it, and the absence, as yet, of a *droit suppletif* raises intricate questions as to how additional external and internal organs are to be created and co-ordinated. The relations with States and other organizations and the means by which they are implemented have been built up according to an elaborate pattern which, although developed out of individual situations, permits already the formulation of certain principles. A detailed account of the types of measures available to an organization, classified according to their nature, their source, their addressees and their effect provides a basis for the consideration of legal remedies. Finally, the author considers the various types of organs, their composition, tenure of office and sphere of operation with special regard to the tripartite division which has become usual, then voting procedure and the position of their functionaries.

The author has succeeded in systematizing the general part of a growing international administrative law. Unlike domestic administrative law and procedure, it is not the product of judicial practice, but of international co-operation and of autonomous creation. The novelty of the undertaking explains a somewhat personal and at times artificial approach, the need to resort constantly to first principles and the ensuing appearance of repetition. Despite its abstract character, the treatise is never divorced from reality, as the exhaustive documentation, both in the text and in the footnotes, discloses on every page. The law of international organizations is no longer the preserve of the specialist. It has been given its place within the framework of general international law.

K. Lipstein

United States Commercial Treaties and International Law. By Robert Renbert Wilson. New Orleans, La.: The Hauser Press, 1960. xi + 381 pp. Price: $6.50.

The United States of America has entered into more than 130 commercial treaties. Since 1778, when the earliest Treaty of Amity and Commerce was concluded with France, they have become highly elaborate and complex documents, as the twelve treaties concluded and ratified between the end of the Second World War and 1 February 1960 make very clear. Their effect has been enormous, not only as concerns treaty practice in general, but also in regard to the measure of protection indirectly afforded by them as a result of the most-favoured-nation clause. With that development Professor Wilson has been intimately connected, for between 1931 and 1953 he served repeatedly in the Department of State, as assistant, as advisor and, finally, as consultant on Commercial Treaties. Moreover, his academic work has for long been devoted to the law of commercial treaties, as the student will know from his numerous

contributions to the *American Journal of International Law* (in which substantial sections of the present book appeared first) and from his most useful book on *The International Law Standard in Treaties of the United States* (1953). Professor Wilson, therefore, possesses almost unique qualifications for explaining 'the implications of these treaties, and especially of certain parts of them, for public international law' (p. ix).

This definition of the object of the author's latest study states succinctly what this important book does and what it does not attempt to achieve. In the first place it does not discuss all provisions included in commercial treaties, but deals with nine topics which, again in the author's words, 'represent a fair cross section of "establishment" provisions' (p. ix), viz. Entry, Work, Property-Protection, Natural Resources, Internal Taxation, Companies, Judicial Remedies, Religion and Military Service; the entire chapter on Companies, however, was contributed by Dr. Herman Walker jr., and this somewhat unusual feature, duly noted in Professor Wilson's preface (though not on the title-page) requires special emphasis. This selection means that such matters as exchange control, the importation of goods, restrictive practices and shipping, among others, are not dealt with in this book. Nor does Professor Wilson intend to offer a detailed and complete commentary on the meaning and effect of the provisions which he had chosen for investigation. Each chapter contains introductory remarks on such matters as the nature of the problem, the domestic law of the United States, or the views of publicists and then proceeds to describe the development of bilateral arrangements both before and after 1923, emphasizing important stages of negotiation, special problems of policy, formulation or interpretation, analysing the different standards which are applicable and estimating the effect of these treaties upon international law in general. A great quantity of (mostly American) material bearing upon these and similar points is referred to, but it must be remembered that the discussion is not anywhere intended to be exhaustive. Although the student will not find in this book the answers to all questions, he will frequently be guided towards them and he will, therefore, come to regard Professor Wilson's book as the starting-point of research into the manifold and fascinating problems to which a modern commercial treaty is liable to give rise.

It would be churlish to select from a book of such weight small points for discussion, but it is perhaps justifiable to raise a question of wider impact: To what extent is it proper or even necessary to interpret a bilateral commercial treaty by applying the municipal law of the high contracting parties (or one of them) rather than international law at large? One cannot help feeling that Professor Wilson would allow wide scope to municipal law and so does Dr. Walker who holds, for instance, that the shareholder of a company can be said to have 'a direct or indirect interest' in the property of the company, 'however fractional or intermediately held' the shareholder's interest may be. This is the American view, but whether it is the view of international law is perhaps not certain (see, for instance, the *Standard Oil Company's* case, in this *Year Book*, 8 (1927), p. 162). Another example is provided by a recent decision of the German Federal Tribunal (19 December 1957, BGHZ 26,200): according to Article V (4) of the American-German Treaty of 1954 (printed in Appendix II of Professor Wilson's book) the compensation payable in the event of the expropriation of property 'shall represent the equivalent of the property taken'. A German statute relating to the expropriation of building land excluded as an item of compensation such increase in value as resulted from a change of user after 17 October 1936. The Federal Tribunal held that there was a discrepancy between the Treaty and the statute, that the

provisions of the former prevailed, and that the American owner, therefore, was entitled to be compensated for the full value at the time of the taking. The result was arrived at without any inquiry into the question what meaning either international law or American law attaches to the words used in the Treaty. It is to be hoped that in due course Professor Wilson will turn his attention to these and similar questions of great practical significance.

One notices a few terms which to an English reader are unfamiliar: 'citizenry' (p. 1); 'origination' (p. 17); 'compromissory clause' (p. 22); 'recency' (p. 171); or 'prorating of income' (p. 175).

F. A. Mann

Das Rechtsschutzsystem der europäischen Menschenrechtskonvention. By Heribert Golsong, Dr. jur., Diplomé of The Hague Academy of International Law. 1958. Carlsruhe: Verlag C. F. Müller, 115 pp.

European Commission of Human Rights. Documents and Decisions, 1955–1956–1957. 1959. The Hague: Martinus Nijhoff.

The author of the valuable monograph, which is the first of the two works under review, is the present Deputy Registrar of the Court of Human Rights at Strasbourg. It does not purport to deal in any detail with the substantive content of the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms but is primarily concerned with the ways in which these rights are or may be given legal protection by the municipal courts of signatories to the Convention and by the bodies set up under that instrument. Consideration of these matters takes up nearly one-half of the work. The author then discusses the system of complaints by individuals, to which in view of its relatively new character he rightly gives an extended treatment, and that of complaints by States against alleged violation of the Convention. He concludes with a description of the procedure before the Commission, before the Committee of Ministers, and as far as was possible at the time of writing, before the Court of Human Rights. There is a useful bibliography which in 1958 was necessarily limited, apart from Mr. Robertson's articles in this *Year Book*, 1950, 1951 and 1952, mainly to works in languages other than English. The position since that date has regrettably not substantially changed.[1] The treatment throughout is practical, lawyer-like and carefully documented; on the whole it leans towards straightforward description and is sparing in comment and criticism.

Perhaps the most interesting part of the work is concerned with the effect of the Convention on the rights of individuals complaining of a violation of the Convention within countries to the jurisdiction of which they are subject. The author lays particular emphasis in this connexion on Article 13 of the Convention which in the English text reads as follows: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.' Dr. Golsong is able to show that in the German Federal Republic (pre-eminently in the decision of the *Bundesverwaltungsgericht*, BVerwG. I. C. 58, 56; BVBl., 1957,

[1] Attention may here be drawn to a colloquium on 'La Protection Internationale des Droits de l'Homme dans le Cadre Europeen' organized by the Faculty of Law and Political Science of the University of Strasbourg with the collaboration of the Directorate of Human Rights of the Council of Europe and held at Strasbourg 14–15 November 1960.

p. 57—noted by Dr. Golsong in this *Year Book*, 33 (1957), pp. 317–21) the Convention is regarded as part of the internal law, annulling earlier conflicting legislation and conferring positive rights to a remedy within the framework of the national system where a violation of the Convention has taken place. A similar use of the Convention (Article 8,) in conjunction with the German Basic Law (Article 6) is to be found in a decision of the Bavarian Administrative Court of 24 March 1959 (*Bayerische Verwaltungsblätter, Jahrgang* 5 (*Neue Folge*), 1959). The author is also able to point to a similar attitude towards the effect of the Convention on the municipal law of the States concerned in Austria, Sweden, Denmark and Greece. Since his book appeared there have been several Dutch decisions which have recognized the relevance of the Convention in Dutch internal law (*Hoge Raad*, 5 May 1959; *Nederlandse Jurisprudentie*, 1959, No. 361. *Hoge Raad*, 22 March 1960; *Nederlandse Jurisprudentie*, 1960, No. 274. Supreme Court, 13 April 1960; *Nederlandse Jurisprudentie*, 1960, No. 436), although in the first and last of these it was held that in fact there had been no violation of the Convention.

Dr. Golsong, however, does not make entirely clear the character of his implied reproach against the Republic of Ireland and against the United Kingdom for having failed to give effect in their internal legislation to the Convention. It is true that he suggests that the Republic of Ireland may not in this respect have complied with 'international' obligations; on the other hand, he speaks of the view that the Convention forms part of the internal law of the signatory States as 'correct', without specifying whether it is correct by reason of action taken in the States to incorporate the Convention as part of their law or because of the automatic effect of the Convention on the internal law of the signatory States. In this connexion, it may be suggested, Dr. Golsong insufficiently emphasizes the difference between the treaty-making procedure of States which require legislative ratification of international treaties, after which their enforcement by the municipal courts becomes a matter of interpreting the scope of the particular treaty, and a State such as the United Kingdom, in which the Executive has full treaty-making power, but with the reasonable limitation, as a matter of internal law, that such treaties cannot, without specific legislation, detract from the rights of the subject (*Walker v. Baird*, [1892] A.C. 491).

Dr. Golsong is on firmer ground in his examination of the scope of Article 13 as an international obligation resting on the signatory States, and the reviewer would respectfully agree with his conclusion that a State which does not provide an 'effective remedy' before a 'national authority' in respect of violations of the rights and freedoms guaranteed by the Convention is in breach thereof. The author suggests further from the drafting history of the Article that in this context an 'effective remedy' means recourse to an independent court whether of an 'ordinary' or 'administrative' character. It may, perhaps be suggested, that he has not fully explored the significance of this interesting, and in some respects, rather difficult Article. It might be useful to consider what would be the effect on the Convention if the Article were omitted. The substantive obligations would remain. A State which ignored them would be in breach of its obligations, even if Article 13 did not exist. What Article 13 seeks to achieve, it is submitted, is twofold: first, it aims at creating a greater assurance that the obligations of the signatory States *vis-à-vis* the individuals who are the designated beneficiaries of the Convention will in fact be carried out and has therefore particular importance for individuals in those States which have not accepted the right of individual petition; secondly, in its concluding proviso, the Article emphasizes that the rights granted by the Convention are not subject to qualification in respect of 'Acts of State'.

The text of the Convention in both its English and French versions (which show interesting variations; for example, Article 13 in English says 'everyone . . . shall have an effective remedy before, a national authority', whereas the French version with more informative precision reads: 'tout personne . . . à droit à l'octroi d'un recours effectif devant une instance nationale') is given in the first *Year Book* of the European Convention of Human Rights covering the years 1955, 1956 and 1957, which is the second work here under review. The text of the additional Protocol (covering the right to property, the right to education and the obligation on the signatory States to hold free elections), particular reservations (Article 64), declarations of extension (Article 63) and derogations (Article 15) are also printed in this volume, together with the Rules of Procedure of the European Commission of Human Rights and the Agreement on Privileges and Immunities of its members. There is a chapter giving in chronological form the main events leading up to and following from the signing of the Convention and a further chapter on the structure, personal details of members and record of the sessions of the European Commission of Human Rights. Apart from this essential material of reference, the volume under review contains a selection of the most important decisions reached by the Commission on individual petitions; these are taken from some 277 decisions rendered by the Commission between 5 July 1955 and 31 December 1957, during which period 343 individual applications were lodged with the Commission. It may perhaps here be observed that it is a remarkable and encouraging feature of the Strasbourg institution not merely that it has been so frequently appealed to, but much more, that the Commission has been able to cope with what might have been an unmanageable flood of applications, long delays in dealing with which would have undermined the system. In addition to the report of decisions on individual petitions, a short account is given of the two inter-State applications between Greece and the United Kingdom, both relating to Cyprus, which have since been withdrawn.

The decisions on individual petitions, all of which, within the period covered by the volume, were declared inadmissible, are grouped under eleven grounds with a short preceding explanatory note of each ground. Most of the reasons given concern the scope of the Convention and the procedure appropriate to applications thereunder, rather than the substantive meaning of the rights which it protects; this is not to say that some of the decisions given are not of the highest interest, on the exhaustion of local remedies for example, as required by Article 26 of the Convention. And the one application, which is not anonymous, that of the German Communist Party, raised an issue of the greatest substantive importance, namely, the interpretation to be put on Article 17 of the Convention, which denies the protection of the Convention to activities 'aimed at the destruction' of the rights guaranteed by the Convention. This particular decision illustrates the advantages and difficulties of the form, borrowed from French procedure, in which the decisions are given. It is at least arguable that the broad question of public interest with which the Commission (and now the Court) are concerned would benefit from a less technical and formalized type of judgment. At all events the stated intention to preface in future volumes the decisions of the Commission with a paraphrase of their legal and factual substance is much to be welcomed.

This important and indeed invaluable work concludes with a bibliography of relevant Council of Europe documents and a selective list of general writings on the Convention. Already extensive at the end of 1957, the list could now with advantage, especially in view of its multi-lingual character and the widening of the field of interest in the Convention to non-European areas, be classified under the aspects of the Convention treated.

NORMAN S. MARSH

La Formazione dell'Ordinamento Marittimo nelle Relazioni Internazionali (Secoli XIV–XVIII). By Basilio Cialdea. Milan; Dott. A. Giuffrè. 1959. 2 vols. xii+429, 394 pp. Lire 2,200 and 2,000.

The first two volumes of this ambitious undertaking to trace the development of maritime law in peace and war from the fourteenth century until the Peace of Versailles in 1783 cover the years up to the Peace of Breda (1667). Treaties, and to a lesser extent, diplomatic and State papers, form the sources. Works on economic and diplomatic history provide the background. Legal writers and judicial practice are mainly disregarded.

After an introduction which describes the setting in which maritime law was to operate, the author discusses first the problem of the security of the seas. A picture emerges which shows that the initial concern with contiguous waters rather than with the high seas resulted from the practice of shipping to hug the coast and from the duty assumed by States to offer protection within this zone. Incidentally, much early material is marshalled which fixes the limits of these water *infra jactum baliste* and in northern seas within a distance of *landkenning*.

Fishing, too, was free, and its control within this zone was claimed for the sole purpose of protection. Only Venice and Genoa in the south, Norway, Denmark and Scotland in the north, laid claim to the control of certain areas of the high seas, though for differing reasons.

Next the author turns to the security of ports, and produces much evidence which proves that many of the rules dealing with the sojourn and behaviour of belligerent vessels in neutral ports, their departure, reprisals in port, hot pursuit and bringing prizes into such ports, are of venerable origin. However, a certain overlapping with the first chapter has not been avoided as regards the treatment of territorial waters and fisheries. Fisheries form the subject of the next chapter which does not add greatly to the existing literature. Next follow two chapters on sovereignty on the high seas, which treat of necessity the claims of England, Scotland and the Nordic countries and to a lesser extent of Venice and Genoa. In substance such claims had a threefold purpose: to control the seas by requiring salute, to protect all shipping and to prevent capture by belligerents. A somewhat cursory chapter on the régime of extra-European seas concludes the first volume. War and its various manifestations in the realm of commerce are the subject of the second volume, which opens with a discussion on piracy, privateering, reprisals and angary. Treaty practice is adduced to show the early forms of regulating privateering, which reflect a common attitude assumed by City States. In particular the evidence illustrating the early origins of the requirement to exhaust local remedies, to resort to conciliation, arbitration or mixed commissions before engaging in reprisals, and an early awareness of the distinction between public and private responsibility make this chapter particularly valuable. A discussion of the limits between war and peace, of the status of enemy merchants and of the approach to trade in time of war, serves as a prelude to an extensive examination of the various principles in the Mediterranean and in the north which determined the attitude of belligerents in controlling and intercepting trade and traffic. The vacillating and often contradictory practices of States are described in the light of the political and economic factors which determined them, especially as concerns contraband, though the treatment of this topic does not add much to that offered by Jessup and Deak, *Neutrality*, vol. i (1935).

A description follows of the evolution of the practice of recognizing the right of

neutrals on the high seas and, more particularly, of the trend away from general prohibitions to lists of contraband. A detailed chapter on visit and search, and two concise sections on blockade and investment and on jurisdiction in prize conclude the second volume.

The author has conceived his study on a grand scale and has covered much of the substance which was previously treated by Gidel and by Jessup and his team. However, by concentrating almost exclusively on treaty practice and in paying much attention to the early history of maritime law in the Mediterranean, he has shown that Italian practice may still yield much material on the early growth of international law. He has shown, too, that the history of international law can be written as a history of treaties. Finally, his work demonstrates that early international treaty practice reflects and often reproduces a common practice of States regulating the rights and duties of individuals and thus contributes a true *jus commune*. The author's historical approach, which attempts to link individual treaties to the political and economic setting which gave rise to them and which forces him to register the multiplicity of solutions, their growth, set-backs and decline according to a seemingly illogical pattern, precludes him from presenting the growth of maritime law in the form of a legal treatise. However, international lawyers nurtured by purely juridical texts are here given a salutory reminder that international law, unlike domestic law, is not the crystallization of custom within a uniform society, but was from the beginning a policy-determined structure which progresses by fits and starts as a reaction to hunger, violence and war. K. LIPSTEIN

Il Regime Giuridico dei Mari. By BENEDETTO CONFORTI. Naples: E. Jovene. 1957. 294 and (Index) 12 pp. Lire 2,000.

The author has made an interesting attempt to do away with the now current dichotomy of the law of the high seas and the law of territorial, and adjacent, waters and to reconstruct the rules pertaining to these areas as a uniform system based on functional, and not on spatial criteria. Rejecting the traditional notions based upon proprietary concepts derived from Roman law, he argues that where the exercise of jurisdiction by a State is not founded on effectiveness, it is accorded by international law for the purpose of satisfying the particular interests of the States concerned. As regards the high seas, these interests can be enumerated without difficulty, and include the prevention of piracy, the interception of contraband, the prohibition of blockade running and of unneutral acts and, by treaty, the repression of slave trading. On the other hand, the author attaches too much significance to an alleged Anglo-American claim to exercise rights of self-defence on the high seas, which he shows to be unjustified. While the chapter on the high seas does not contribute much that is new, except a firm doctrinal approach in explaining the existing rules, the same doctrinal handling affects fundamentally the much more extensive chapters on territorial and adjacent waters. It leads to the conclusion that, as regards those parts of the sea which are directly connected with the social interests of the coastal population viewed in a broad sense, the realization of these interests through the extension of jurisdiction must remain variable, except for the purpose of delimiting the sphere of duty—three miles—in which a neutral state must fulfil its obligations as a neutral in time of war. It follows that any spatial view of the jurisdiction of coastal states is merely a rational generalization based upon an inadmissible territorial view of jurisdiction over the sea. The author argues his thesis skilfully with reference to the varying and often conflicting State jurisdiction in respect of fisheries, customs including hovering legislation, security and sanitary measures. It leads him to deny the existence of special interests on the high seas, where

the social interests of the coastal population cannot be said to be exclusively involved, and to assert that the exclusion of other than local interests in respect of the continental shelf is justified only in so far as the erection of foreign installations threatens security.

The author's thesis may be summed up as follows in terms which he himself does not employ: international law does not prescribe exact limits for the exercise of jurisdiction over any part of the sea. Instead it provides a framework (*Blankettnorm, loi cadre*) within which States are free to act at various distances for different purposes. Since these purposes are determined by recognized local interests, it seems that in the majority of situations historically established interests will be accorded that recognition which they have claimed hitherto, but the author does not appear to limit recognition to these interests only. However, in denying recognition in regard to wider areas of the high seas, it is difficult to see, as the author admits on several occasions, where the line is to be drawn except on grounds of absence of effectiveness. His contention that the concept of territorial waters as a rigidly defined zone is the product of English legal thought in the nineteenth century is interesting, but legislation, such as the Territorial Waters Jurisdiction Act, 1878, cannot be cited to support this sweeping assertion. The author's use of historical material is at times sketchy, but his doctrinal arguments are well marshalled. While they do not add much which is new to the existing literature on the law of the high seas, they are employed with good effect to construct a legal régime of the seas adjacent to a coastal State which is to supersede that of territorial waters, contiguous zones and the like. Such a régime would not possess any advantages of greater certainty than that which appears to be accepted today, but the existing uncertainties are given a theoretical justification which raises flexibility to the level of a general maxim. If this is correct, an international convention which is declaratory of existing variants in respect of jurisdiction over different parts of the sea rather than any codification of the law is called for, followed by periodic adjustments having regard to the changing social needs of the respective coastal populations.

K. Lipstein

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